IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. [illegible]

MAJOR RAYMOND LISENBA,
*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

On writ of certiorari to the Supreme Court of the State of California

## RESPONDENT'S BRIEF

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OCTOBER TERM, 1940

No. 133

MAJOR RAYMOND LISENBA,
*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

**On writ of certiorari to the Supreme Court of the State of California**

## RESPONDENT'S BRIEF

### STATEMENT

Petitioner was tried and convicted in the superior court of the State of California, in and for the County of Los Angeles, of the crime of murder. He moved for a new trial which was denied and thereupon judgment of death was imposed upon him for the commission of said crime. An appeal was taken to the Supreme Court of the State of California from the order denying petitioner's motion for a new trial and from the judgment. On

March 21, 1939, the judgment and order denying a new trial were affirmed by said Supreme Court, and a rehearing was granted by said court on April 20, 1939. (89 Pac. (2d) 39.) On October 5, 1939, the said judgment and order were again affirmed by said court and on November 3, 1939, a rehearing was denied. (94 Pac. (2d) 569, 14 Cal. (2d) 403.) On October 31, 1939, petitioner filed with said Supreme Court an application for writ of habeas corpus which was denied without prejudice on November 9, 1939. (98 Cal. Dec. Minutes of Nov. 9, 1939.) On November 6, 1939, an appeal was allowed by said Supreme Court to the Supreme Court of the United States from the judgment made and entered on the fifth day of October, 1939, and on the eighteenth day of January, 1940, an appeal was allowed by said Supreme Court to the Supreme Court of the United States from the order made and entered on the ninth day of November, 1939, denying petitioner's application for a writ of habeas corpus. On October 28, 1940, this Honorable Court dismissed said appeals for want of jurisdiction but, treating the papers whereon the appeals were allowed as petitions for writ of certiorari, granted certiorari.

## POINTS RELIED UPON BY PETITIONER

The points relied upon herein by petitioner, in the order set forth in his brief, are as follows:

I. That third degree brutal methods were used upon him to coerce and extort a purported con-

fession and the use of such means and methods rendered the entire trial void under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

II. That two live rattlesnakes were brought into the courtroom and exhibited to the jury, which snakes had no evidentiary value, and the use of demonstrative evidence which only serves to inflame the passions and prejudices of the jury violates the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

III. That the introduction of evidence of the circumstances surrounding the death in the State of Colorado of a former wife without such crime being charged in the indictment and without notice being first given to him of such charge contravened his rights under the Fourteenth Amendment of the Constitution of the United States;

IV. That the testimony of the witness Charles H. Hope was false and known to the prosecution to be false, and therefore the trial was a mere pretense and was in violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States;

V. That he was deprived of the right of counsel after his arrest and at the time he was interrogated, and therefore the use of his statements constitute a

violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

VI. That he was denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

## STATEMENT OF CASE

Robert James, petitioner, was convicted of the crime of murder of his wife, Mary James. Petitioner's true name is Major Raymond Lisenba. The word "Major" is not a title, but a given name. This name he discarded a number of years ago and has since been known as Robert James. (R. 484.) He was a barber by trade with his place of business in Los Angeles, California. (R. 713.) His wife, Mary James, was found dead at the fish pond in the rear of petitioner's residence in La Canada, California. La Canada is a small town near the City of Los Angeles. She was lying face down with her head and a portion of her shoulders in the water; the right arm folded underneath her and the left arm lying at her side. (R. 21, 23.) The water in the fish pond at the place where the body was lying was approximately fourteen inches deep. (R. 52.) The deceased was found in this position in the early evening of August 5, 1935. No prosecution was commenced for the crime of murder until May 6, 1936 (R. 815.) because proof of the criminal agency producing the death of Mary

James was not discovered until after Hope was arrested and questioned on May 1, 1936. (R. 469, 630, 631.)

AT THE TRIAL THE FOLLOWING FACTS WERE ESTABLISHED:

Early in 1935, James met E. L. Taggart, an automobile salesman, and stated that he desired to buy a cheap car with the understanding that he could turn it in on a large Studebaker in a few months upon his receipt of ten thousand dollars from an "estate." (R. 1094.)

About March 1, 1935, James met Mary E. Busch, who subsequently became his wife, when she applied at his shop for a position as a beauty operator. (R. 721.) In April of 1935, James had a conversation with Louis Berry, an insurance man connected with the Mutual Life Insurance Company of New York, at which time he told Berry he knew of "some certain girl" that would be interested in taking some life insurance but that he was not prepared to tell him who the prospect was "until the prospect was ready." (R. 216, 217.) James wanted to know the cost of a five thousand dollar insurance policy on a girl twenty-six years of age. About two weeks later, Berry submitted to James a proposition for the five thousand dollars worth of insurance. The following week Berry asked James if he was prepared to give him the name of the prospect and James said he was, whereupon he called Mary E. Busch

from the rear of the barber shop and introduced her. (R. 218.) As a result of this meeting an application for insurance on Mary E. James, nee Busch, was executed May 7, 1935, for five thousand dollars worth of insurance in the Mutual Life Insurance Company of New York.

About a week before the application was actually executed, James told Berry that Berry's price was higher than that offered by a competitor. (R. 219.) About two weeks after the date of the application for the insurance but before the actual delivery of the policy, Mary James informed Berry that she was now married to James (R. 227.) James was named beneficiary. (Exhibit 22.) Prior to this the estate of Mary Busch was made the beneficiary. (R. 228.) Although Mary James thought she was married to James, she was in truth and in fact not married to him, because James had an annulment proceeding pending as to a prior marriage, and unknown to Mary he had caused a fake marriage to be performed, which was prior to the actual delivery of the insurance policy of this company on June 25, 1935. The fake marriage ceremony took place May 9, 1935, two days after the application for insurance was made with Berry's company. (R. 249-251.) The subject matter of insurance was first discussed with Mary James about the fourteenth or fifteenth of March, 1935. (R. 737.)

Between May 25th and May 28th, James negotiated with Max Galatz of the Occidental Life Company of Los Angeles, for two insurance policies on Mary James, one for seven hundred dollars and one for five thousand dollars. (R. 228-230.) James supplied the information in the application for insurance, stating that he was the husband of Mary James, and Mary James confirmed this statement. James was named the beneficiary and was told that he himself would have to have a larger amount of life insurance than his wife Mary or the policy could not be written. (R. 232, 234.) Galatz told James that he would have to take five thousand more insurance on his own life, and James said, "Really you know I want all the insurance I can get." (R. 234.) James at that time assured Galatz that he already had plenty of insurance on his own life to satisfy the company's requirement, and Galatz let the matter go for several days and checked with his company and then returned to James and actually took an application on the life of James in the amount of three thousand dollars. (R. 234, 235.) After obtaining the policy on his own life, James paid only one premium thereon. (R. 237.) The two policies on the life of Mary James were delivered to James and he paid for them at that time. (R. 236.) They provided for double indemnity in the event of accidental death. (Exhibits 25 and 26.)

Sometime in June, 1935, James asked Charles Hope, (R. 58), who frequented James' barber shop over a period of about seven years and on several occasions had borrowed money from James (R. 125, 126), if he knew anything about rattlesnakes. Hope replied in the negative. James said that he had a friend who had a wife that had been annoying him quite a bit, and he was going to kill her and wanted to get some rattlesnakes. James told Hope that if he would get some rattlesnakes he would give him $100. (R. 59, 60.) Toward the latter part of June, James inquired of Hope if he had found out about the rattlesnakes. (R. 60.) Thereafter, Hope purchased three rattlesnakes and obtained a quantity of rattlesnake venom in crystal form from a man named Kirby in Long Beach, California, and took the rattlesnakes and venom to James at his home in La Canada. (R. 62, 63, 170, 171.) Thereafter, Hope saw James at the barber shop and James offered to let Hope stay at his home in La Canada for a few days, which offer Hope accepted. (R. 64.) It appears that Hope was having domestic trouble with Mrs. Hope and was not living at home. (R. 714.) Thereafter, pursuant to James' instructions, Hope had two boxes made by a cabinet maker. These boxes were delivered to James' house by Hope. (R. 65, 66.) Hope ceased living at James' house about the middle of July and later saw James at the barber shop. (R. 67.) At this time James said, the "man" was dissatisfied with

the snakes, they are not fighters, there are good snakes to be had at the snake pit in Ocean Park where, he thought, they are sold by the pound. (R. 67.) Hope and James went to Ocean Park, which was in the month of July, 1935, and saw the snakes in the snake pit and James said to Allman, the snake man, that he would bet there was not a poisonous snake in the pit. Hope and James were noisy and appeared to have been drinking. (R. 68, 195.) On the following day Hope was there alone and purchased from Allman a rattlesnake for three dollars. Hope had a box with a glass top containing a rabbit and asked Allman to put the snake in the box with the rabbit to see if the snake was poisonous, and said to Allman that James had bet him fifty dollars there was not a poisonous snake in the place. Allman replied that he could not do that because of the Humane Society and told Hope to take the rabbit elsewhere for the experiment. (R. 196, 197.) Hope delivered this snake to James at the barber shop. (R. 69.) Thereafter, Hope saw James and James said the snake was no good, that he wanted "some fighters." Allman had told Hope that he had purchased the snake from "Snake Joe" Houtenbrink in Pasadena, California. Hope then went to Houtenbrink's and purchased two more rattlesnakes and delivered them to James. The trip to Houtenbrink's was made in James' car with Mrs. Hope. (R. 70.) Hope met Mrs. Hope at about 2 o'clock p.m., where she was working. (R. 178.)

She remained in the car while he took a box out of the car and went into the yard of Snake Joe's. Later, Hope returned with the box and they drove back to Los Angeles and he let her out of the car at her home. (R. 179.) He telephoned to James and drove to the barber shop with the snakes. This was about 6 o'clock p.m., August 3, 1935. (R. 69, 70, 146.) Hope and James rode away from the barber shop in James' car and at this time James told Hope that his wife had five thousand dollars worth of insurance which he was going to collect. (R. 71, 72.) At about 7 o'clock p.m. Hope met Mrs. Hope; they had dinner and at about 8 o'clock p.m. they went to a show. (R. 179.) The following day, August 4, 1935, which was on a Sunday, Hope drove to his wife's apartment and ate breakfast with Mrs. Hope at about 10 o'clock a.m. (R. 180); they went to La Canada in their coupe to "get the snakes back, which statement was stricken by the court upon motion. (R. 72, 180.) Hope left his wife waiting in the coupe on the corner near James' house. (R. 180.) This was between 12.30 or 1.00 o'clock in the afternoon. Hope saw James and they went to the garage where they had several drinks; the snakes were in the boxes in the garage, along side of which were three or four dead chickens. James had been drinking a little bit and told Hope that he could not have the snakes right then. (R. 73.) Hope returned to his wife and after talking with her, she drove away in

their car (R. 73, 180) and he went back to James' garage, whereupon James said, "You are in this thing as deep as I am. You have bought these snakes all over the country. Now bring the boxes in the house." (R. 73, 74.) Hope carried a box with a snake in it into the house and to the kitchen. There he saw Mrs. James lying on the breakfast table with adhesive tape over her eyes and mouth and tied to the table by a rope. (R. 74, 75, 665.) The box was placed on the breakfast nook seat close to the breakfast table, and James took hold of Mary's left leg near the calf and placed her left foot in the box at which time the snake struck while Mary's foot was on a level with or just above the head of the snake. (R. 665-668.) Mary was dressed in a nightgown and her legs and feet were bare. After her foot was removed from the box, Hope closed the lid of the box and took it out to the garage and waited. (R. 75.) In fifteen or twenty minutes James came to the garage and handed Hope a water glass full of whiskey and said, "What is the matter with you. What are you so nervous about. She is all right. Drink this, it will steady your nerves." They had several drinks. Hope asked James for the key to James' car, and said that he wanted to take the snake away. James said he would give him the key to his car. Later James gave him the key and Hope put the snakes and the dead chickens in the car and drove to Los

Angeles and got Mrs. Hope. They drove to Pasadena where the snakes had been purchased (R. 75, 76), arriving there at about 3 o'clock in the afternoon and Houtenbrink repurchased from Hope for $1.50 the same two snakes which he had sold to Hope on the previous day for $3. Houtenbrink kept these identical snakes at his snake farm and the identical snakes were produced as exhibits in the court room, they being the same ones he had sold to Hope on August 3d. (R. 204.) After Hope and Mrs. Hope left Houtenbrink's place in Pasadena in James' car and while driving around and about the City of Los Angeles, Hope threw the boxes from the car. (R. 76, 77, 182.) Later that evening Hope left Mrs. Hope at her home and at about 1.30 o'clock a.m., Monday, August 5th, Hope took the car back to James' house. (R. 77, 182.) James came to the car, got in it with Hope, and they had some drinks from a bottle, and James said, "Those snakes are no good either," and that he was going into the house and drown his wife, whereupon James left Hope. Hope stayed in the car and at about 4 o'clock a.m., James came out of the house and said, "That is that." (R. 77, 78.) James asked Hope to "stay here a little bit and I will take you into town." At about 7 o'clock a.m., Monday, August 5th, James came out of the house and said his wife was dead and he had cleaned up the house, and he asked Hope to help him carry out the body. Hope entered the house and found the

body of Mrs. James lying in hallway with her feet toward the bathroom and together they carried the body to the edge of fish pond at the rear of the house, but Hope refused to help put the body in the pond and went back to the car. Presently James came to the car with three blankets, some soiled clothes, some pieces of rope, and they drove in James' car to where Hope's car was in Los Angeles. While driving to Los Angeles James said to Hope, "Don't get all excited, don't be so nervous. I will take care of you when I get this money." James gave Hope thirty dollars, together with the materials taken from the house, and told Hope to dispose of "this stuff" and get out of town. (R. 78, 79.) Hope took the materials and put them in his car and drove to Mrs. Hope's residence where he left the blankets and destroyed some of the materials in the incinerator. (R. 79, 80.) The blankets were produced at the trial and identified by Hope and Mrs. Hope. (R. 90, 91, 183.) Mrs. Hope saw her husband on this occasion at about 8.30 a.m., and observed that he was "white and jittery and had been drinking." (R. 182.) Hope identified at the trial some pieces of rope which were exactly like the rope that was used to tie Mrs. James to the kitchen table (R. 81.) and these particular pieces of rope were found by a district attorney's investigator, in a trunk belonging to James, which trunk had been stored by James after the murder, in the home of Mrs. Smith, James' niece. (R. 185, 187, 188, 189.)

## OTHER PERTINENT FACTS AND CIRCUMSTANCES

On July 10, 1935, James made the acquaintance of Madge Reed at the Italian Village where they had some drinks together and James became quite intoxicated. He told her that he was on a vacation from Kansas City and lived with his sister. Madge Reed drove him to his home in his car. While there Mary James arrived from a convention in Long Beach. Madge Reed thereupon left and rode home on a bus. On the following day James telephoned Madge Reed and apologized for taking her to his home as he had not expected his wife to be home that day and asked her to go to San Diego with him. Between July 11, 1935, and August 3, 1935, the Saturday before Mary James' death on August 5, 1935, James called Madge Reed on the telephone on numerous occasions and wanted her to go out with him. (R. 416-420.)

Mary James became pregnant and from and after July 16, 1935, she was attended by Doctor George for nausea and sleeplessness. (R. 782.) On July 19, 1935, James was legally married to Mary at Santa Ana, California. (R. 249.) On July 29, 1935, James called Berry, the insurance man for the Mutual Life Insurance Company of New York. (R. 221.) On July 30, 1935, James talked with Berry and wanted to know if it would make any difference in a life insurance policy if the applicant had stated that she was married when in truth and in fact she was not married, and that Mary had

said she was married but was not actually married to him until July 19, 1935. Berry agreed to submit the question to the company and asked James for the marriage certificate and the insurance policy for the purpose of forwarding these documents to the company in connection with the inquiry. At that time, James actually had in his coat pocket the policy and marriage certificate which he then and there gave to Berry, taking Berry's receipt therefor. (R. 221, 222.) On August 3d, James called Madge Reed on the telephone and asked her to go out with him. (R. 420, 421.) On August 5th, Berry returned the policy and marriage certificate to James at the barber shop, inquired about the health of Mrs. James and was informed by James that she was getting along nicely. Berry was a customer of James and each week when he was in the barber shop Berry inquired about the health of Mary James because of her absence from the shop and was told on each occasion that Mary was ill at home but was doing nicely, that she had health insurance and was in no hurry to get back to work. (R. 222, 223.) At the time Berry returned the insurance policy and marriage certificate to James and inquired about Mary's health, Mary was dead and her body was in the fish pond, as hereinbefore related.

In the neighborhood of about two weeks before the death of Mary James, which would be somewhere about the twentieth of July, 1935, James

called Waddell, who was unit manager of the Occidental Life Insurance Company, and Waddell went to see James. James met Waddell at the entrance to the barber shop and he asked Waddell to walk up the street with him. James entered a liquor store and went into the lavatory and Waddell followed. James said he was anxious to learn what the status of the insurance on Mary James would be in the event of her death if the insurance had been applied for out of wedlock, that he and Mary had contemplated being married, but at the time of the insurance were not married, that Mary had been called to Long Beach for some dental work and had been detained there, but that they had subsequently been married. Waddell informed James that the matter should be submitted to the company and that he could give him no definite answer. (R. 241-245.)

On the day of the murder, Monday, August 5, 1935, James arrived at his barber shop at some time before 9 o'clock a.m. (R. 741.) At about 2 o'clock p.m. August 5th, James called Viola Pemberton on the telephone and said that Mary was not feeling well enough to come to town to keep their previous dinner engagement. Viola Pemberton and Mary had known each other for about two years (R. 2), and on the previous Wednesday the Jameses and the Pembertons had agreed to have dinner together on the following Monday evening either in town or at the James' home in La Canada, depending upon the

Pembertons being informed by James on Monday whether they would have dinner in town or at his home. (R. 13.) During this telephone conversation on Monday, James told Viola Pemberton that Mary had vegetables ready, and that Viola and her husband were to go to his home. They arranged to meet in front of the telephone office, where she worked, at 7.30 p.m. (R. 3.) Pursuant to said appointment they went to James' home, arriving there shortly after 8.00 p.m., and entered the back door. The house was dark and a search was made for Mary James. (R. 3, 22.) James and Mrs. Pemberton called out Mary's name, but there was no response. James found a note as they went to open the front door to see if Mary was on the front porch. James read the note to them and there was no way of telling from the note when it had been left there but it stated that "someone" had been there. After looking through the house James suggested getting lights and looking outside. Mr. Pemberton looked around the front yard and then walked around to the back yard where he found the body of Mary James as heretofore described. (R. 22, 23.) The note just referred to had been written by Ethel Smith, a niece of James, on Sunday, August 4th, about 5.00 p.m., at which time Ethel Smith stuck the note in the crack in the front door, observed that all the shades were down and looked around the premises for fifteen or twenty minutes.

(R. 185, 186.) As we have heretofore related, Hope, at about this hour was returning the snakes to "Snake Joe" in Pasadena in James' car and disposing of the boxes. James, according to his conflicting stories, as hereinafter related, claimed to have been at Mt. Wilson with Mary in the car, and also on a drive with Mary through Flintridge and Glendale and also out on an afternoon walk with Mary.

At about 8.30 p.m. August 5th, the day of the murder, after the body was found, sheriff's deputies came and looked over the scene. (R. 49.) On the dining room table was found a letter in a sealed envelope addressed to Mary's sister in Nevada. Mrs. Pemberton opened the letter in the presence of the officers and read it aloud to them as she was instructed to do by James. (R. 8, 9.) She asked "Where is the other note?" whereupon James said he did not know but "fished" around in his pockets and found it. (R. 51.) The letter addressed to Mary's sister is as follows:

> "Dear Sis: Just a line this morning to let you know I am pretty sick. My leg is all swollen. Something bit me while watering my flowers this morning. I cut my toe yesterday, and having lots of bad luck. It is ole blue Monday, but my daddy will be home early tonight and he takes good care of me. Be sure and write me soon. I will let you know how I get along." (R. 409, 410.)

Exemplars of Mary James' normal handwriting were introduced in evidence (R. 10.) and by comparison they showed that this letter was not in Mary's normal handwriting. (Exhibits 4 and 5)

When Mary James' body was found it was observed that her left leg was swollen and very blue (R. 49), that there was a cut on the left big toe, and that between the ankle and the knee the leg was very dark and almost black. (R. 57.) On August 6, 1935, an autopsy was conducted by Dr. Wagner. (R. 94.) He found a laceration on the lower surface of the left great toe; the left foot was considerably swollen; there was no evidence of disease of the vital organs; there were superficial bruises of varying extent on various parts of the body; there was no poison found in the stomach, liver or kidneys; and he found a normal six-weeks pregnancy and no evidence of an abortion or attempted abortion. (R. 93, 792.) He attributed the death to drowning and acute cellulitis of the leg, which was swollen up to the hip, and stated that the discoloration extended to the knee and was "quite marked". There were bruises on the right arm and chest, a slight bruise and scratches on the left arm and discoloration of the back of the right leg up to the knee. (R. 94, 95.) He testified that cellulitis is usually caused by bacteria (R. 95); that bacterial infection causing cellulitis takes from two or three days to a week, as a rule, but that animal poisons causing cellulitis go much faster (R. 96); that cel-

lulitis of this kind is caused by venom or insects, snakes, spiders and the like, and that the cellulitis of the kind found in this autopsy could have been cause from the bite of one of such reptiles. (R. 97.) On May 5, 1936, about nine months after the first autopsy, a second autopsy was conducted, after the body was exhumed, in the presence of Dr. Boehme. The left leg and toe were reexamined and Dr. Wagner reached a conclusion that the laceration of the toe could have been made by a rattlesnake fang (R. 98, 99); and that the cellulitis present in deceased was not of the bacteriological type but was of the "animal poison" type, and "could have been" caused by the bite of a snake. (R. 1092.) At the time of the original autopsy Dr. Wagner did not think about snakebite. (R. 105.) The scratches and marks on the body below the head and face were, in his opinion, made during life rather than after death. (R. 108.) The left leg was markedly discolored and almost mahogany in color, and this condition was probably produced by a snakebite, according to the testimony of Dr. Boehme. (R. 110.)

A few days previous to the death of Mary James, James told Mrs. Pemberton that Mary was "crazy to have a baby but I don't want one". (R. 1113.) After Monday night (August 5, 1935) James spoke to his niece, Ethel Smith, about the note which she and her husband had left under the door on Sunday, August 4th, about 5 o'clock. James thought

the note had been left on Monday and said to her, "Why were you there on Monday?" Ethel Smith said she had been there Sunday, and during the conversation he told her that he and his wife Mary had driven to Mt. Wilson on Sunday. (R. 186.) On Wednesday, August 7, 1935, James told deputy sheriffs investigating the matter, that on the afternoon of Sunday, August 4th, he and Mary had taken a drive in the afternoon through Flintridge, coming back to the house by way of Glendale. (R. 762.) At the trial, James testified as a witness in his own behalf that on that same afternoon, Sunday, August 4th, he loaned his automobile to Charles Hope and thereafter, during the afternoon, he (James) and his wife Mary had gone out for a walk and were away from the house about an hour and a half, between 4.00 p.m. and 5.30 p.m. (R. 761). On August 7, 1935, while talking with deputy sheriffs regarding the death of his wife Mary, James told them he had no knowledge whatsoever that Mary had cut her toe or hurt herself in any way, that the first he knew of the matter was from the letter found at the house after her death, which was addressed to her sister. (R. 785, 786.) At a trial in the Federal Court on March 31, 1936, in an action entitled Robert James vs. Mutual Life Insurance Company of New York, James testified under oath that he never knew his wife Mary to faint at any time. (R. 765, 785.)

On August 11, 1935, six days after the death of Mary James, James called Madge Reed, the woman he had met at the Italian Village on July 10, 1935, heretofore related, on the telephone and asked if she had been reading about his wife's death in the newspapers, and said he wanted to talk to her about what had been in the papers. She consented and James went to her apartment, and the two then went for a ride in his automobile. James told her about his wife and how "they" were trying to frame him on the case, that he didn't believe in mourning, that as long as his wife was dead he would collect the insurance, that he would marry her (Madge Reed) and take her north, and that if he was indicted he wanted to spring her as a surprise witness and would give her two thousand dollars to testify that she had met him and his wife five weeks previously at the Italian Village, and on the morning of his wife's death she, Madge Reed, was out for a ride and saw his wife standing on the porch, that his wife explained she was not feeling well, that his wife then went and lay in the hammock and said she had a sore on her leg. James and Madge Reed registered at a hotel in Hermosa Beach for the night and when he left her the next morning he gave her sixty dollars to show that he really meant business and she was to receive from him the two thousand dollars whether she testified or not. She made notes on a card pursuant to his request setting

forth the time she was supposed to have met him and his wife. He also gave her Mr. Silverman's name and telephone number. (R. 421-424.) Mr. Silverman was James' lawyer. (R. 481.)

Between the fifteenth and twentieth of August, 1935, James conferred with Berry, the representative of the Mutual Life Insurance Company, and in several conversations on different occasions, James asked whether the company would pay double indemnity under the policies on Mary James, as the result of her having died in an accidental manner. (R. 223, 224.) In litigation which followed after deceased's death James claimed double indemnity under the provisions of the policies in the Occidental Life Insurance Company, but settled for the sum of $3500 (less than the face value of the policies). (R. 1093, 1094.)

About the 22d of March, 1936, J. C. Southard, an investigator for the district attorney's office commenced an investigation into the death of Mary James, and while investigating this matter, he arrested James on a felony committed in his presence, i.e., the crime of incest on Sunday, April 19, 1936, at about 9 o'clock a.m. (R. 456, 458, 463, 560, 561.) James was taken before the district attorney who questioned him about the incest and showed him a typewritten statement made by James' niece, Lois Wright, confessing the offense, at which time James refused to talk to the district attorney. (R. 466, 467, 468.) James at about 5

o'clock that afternoon was taken to a house adjacent to the one he was living in on LaSalle Street in Los Angeles and questioned by the police and investigators of the district attorney's office. (R. 555, 560.) He was returned to the district attorney's office on Monday, April 20, 1936, where he conferred with his counsel, Mr. Silverman. (R. 571.) On April 21, 1936, at about 10 or 11 o'clock a.m., James was booked in the county jail. (R. 576.) On this same day he was arraigned in the superior court on the crime of incest and was represented at the arraignment by his attorney, Mr. Silverman. (R. 483.) Between the time of his arraignment on said charge of incest and May 2, 1936, his attorney, Mr. Silverman, visited him in the county jail on April 25, 1936, and saw him on several days thereafter until about a week later at which time Mr. Silverman called upon petitioner in the attorney's room at the county jail and advised him that if questioned, not to answer any questions unless it was in his (Silverman's) presence. (R. 481, 482.) James was not again interviewed by the authorities until about 11.45 a.m., May 2, 1936, at which time he was taken to the Chaplain's room in the county jail and told in the presence of Hope, who was arrested on May 1, 1936, that Hope had confessed and he (James) was asked if he had any statement to make relative to anything stated by Hope which incriminated him (James) in the death of Mary James and answered "nothing." (R. 493, 494.

630, 631, 732, 733.) Later in the day on May 2, 1936, James was again interviewed by the authorities and after having his dinner and while seated in the cafe, he freely and voluntarily gave his version as to the death of his wife which statement was later reduced to writing and read in evidence at the trial. (R. 631, 632, 641-660.)

Sometime between April 21, 1936, and May 2, 1936, James was taken before the grand jury and indicted for the crime of incest and on May 6, 1936, he was indicted with Hope for the murder of Mary James. (R. 493, 815.) James was tried first under the indictment charging incest and after his conviction of said crime, he was tried on the murder charge, the proceedings which resulted in his conviction of said crime being now under review by this Honorable Court for asserted error therein. (R. 502.)

In addition to the evidence hereinbefore set forth, certain facts were admitted by James in his testimony while a witness in his own defense. He admitted that he had known Hope for seven or eight years (R. 713); that Hope had stayed at his house three or four days in July, 1935 (R. 714); that Hope was in the garage with him while he was "treating" some chickens for a cold (R. 714); that Hope said he was broke (R. 714); that Hope had a box with some yellow stuff in it which he said was rattlesnake venom and wanted to experiment with it on a chicken (R. 715); that thereafter and

on the sixth day of July, 1935, he saw Hope at the barber shop and gave him a key to his (James') house. (R. 715.) James testified that he introduced Hope to his (James') wife and to his sister at breakfast as "Dr. Smith" (R. 716); that at breakfast Mary James was nauseated because she was pregnant, and said "Dr. 'Hope' (evidently meaning Dr. Smith) will take care of me"; that Hope said he would (R. 716); that he (James) didn't know what it was all about (R. 716); that he (James) was pleased because Mary was pregnant and Mary was also very pleased at the time (R. 717); that Hope remained at the house until the following Wednesday and then left and did not return again until August 3, 1935; that he had permitted Hope to take his (James') automobile many times (R. 717); that he had loaned Hope money and had given him money in the barber shop many times (R. 717); that he first met Mary James on March 1, 1935 (R. 721); that Mary James applied at the barber shop for a position as a beauty operator (R. 721); that he aided Mary James to take out insurance (R. 722); that some time after he had been placed in the county jail, officers took him to the chaplain's room in the county jail, at which place Hope was present, and there the officers told him the story that Hope had told them and then asked what he had to say about it, and he said he had nothing to say about it (R. 732, 733); that he knew Madge Reed and met her at the cafe

one afternoon where they were drinking cocktails; that while his wife was away, Madge Reed had driven him to his home (R. 735, 736); that the first time he talked to Mary James about insurance was about two weeks after the first of March, 1935 (R. 737); that the matter was discussed every few days until she got the insurance (R. 737, 738); that on Saturday, August 3, 1935, he loaned Hope his car and Hope returned it the same day (R. 742, 743); that on Sunday, August 4, 1935, Hope came to the house and said he had made arrangements with Mary James to perform an operation on her and that Mary had informed him (James) on Friday that it was to take place, but he (James) had begged Mary not to do it (R. 743); that on Sunday, August 4th, Hope told him what he was there for; that he didn't want Hope to talk about "it" as it was against his wishes; that he left the house and didn't return until one o'clock Sunday afternoon; that Hope stayed with Mary James at the house and took care of her while he was away (R. 744); that at 1.00 o'clock Sunday afternoon, Hope left his (James') house with his (James') automobile and kept it until 6.30 Monday morning, August 5th (R. 744); that Mr. and Mrs. Pemberton had previously arranged to have dinner at his home August 5, 1935 (R. 744, 745); that on the morning of August 5, 1935, before he left home he had a conversation with Mary in the presence of Hope; that Mary stated she had not started to

menstruate and Hope said he would take care of that, for him (James) to go to work and he (Hope) would probably spend the day there (R. 750); that later in the day, Hope called him on the telephone and said he had come to town (R. 750); that he knew at the time he discovered Mary's body in the fish pond on the night of August 5, 1935, that Mary and Hope had been discussing the commission of an operation on her by Hope and Hope had said he intended to do something to do away with her pregnancy, but that at that time he did not believe she had di as the result of an operation by Hope and didn't think Hope had anything whatsoever to do with her death (R. 755); that when he talked to Hope on the telephone on August 5th he didn't ask Hope anything about an operation or abortion upon Mary James; that he did not ask Hope anything about Mary's condition (R. 776, 777); that he did not make any report to any officer or official to the effect that immediately prior to his wife's death Hope had performed an abortion upon her; that he believed that Hope had performed an abortion upon Mary (R. 778); that on August 7, 1935, his belief was that Mary had fainted and fallen into the fish pond; that he did not believe that Mary's death was due to the cut on her toe or the bite of an insect (R. 778, 779), that Mary had told him she had cut her foot out in the yard on a tin can (R. 751); that he didn't know anything about her toe being hurt (R. 772); that on the thirty-first

of March, 1936, while testifying in the Federal Court he might have said that he had never known Mary to faint (R. 756); that he probably did tell officers on August 7, 1935, that he and Mary had gone for a drive through Flintridge, coming back by way of Glendale, on Sunday, August 4, 1935; that he arrived home with the Pembertons on the evening of August 5, 1935; that upon finding the house dark he became alarmed and felt that maybe Mary had fainted "around" the chicken house in some way (R. 740, 762); that he and Mr. Pemberton went out the rear entrance of the house together with flash lights; that he went back to the chicken house and that Mr. Pemberton found Mary at the side of the house in the fish pond. (R. 740.)

The entire foregoing recitation of the evidence has been made without reference whatsoever to the contents of any alleged confession of James. The alleged confessions, about which James complains, were obtained May 3, 1936. The exact details of the manner in which those confessions were secured are recited in our argument under Point I of this brief. The confessions proved James' guilt of the murder of Mary James beyond peradventure.

In addition to the foregoing, the people placed in evidence, for the purpose of establishing beyond any reasonable doubt that the death of Mary James was premeditated murder and not the result of an accidental cut on the toe or insect bite from which she fainted and accidentally fell into the fish pond

and drowned, facts and circumstances surrounding the death of a previous wife of James who was found dead under conditions quite similar to those present in the instant case. This evidence showed that the death of Mary James was consummated in accordance with a plan and scheme formulated and used by James over a period of years to obtain, whenever needed, large sums of money from insurance companies. The particulars of the murder of a previous wife by James are set forth in this brief under Point III, in answer to petitioner's contention that the admission of this evidence contravened his rights under the Fourteenth Amendment of the Constitution of the United States.

## SUMMARY OF ARGUMENT

The theory upon which the case was presented by the people was that petitioner, in league with Hope, had plotted and consummated the death of petitioner's wife for the purpose of collecting and dividing the proceeds of certain insurance policies on her life and that the homicide was perpetrated in such manner as to give the appearance of accidental death, not only to allay suspicion but in order to bring into operation the double indemnity provisions of the insurance policies. Under this theory the people submitted evidence showing that petitioner and Hope undertook to bring about the deceased's death by means of a deliberately inflicted poisonous rattlesnake bite, the assumption probably being that, if fatal, such bite or laceration would

appear to have been incurred in or about the garden of her home by stepping on a tin can or having been bitten by an insect, and that this ingenious method of destruction having proved ineffective, the conspirators accomplished their objective by deliberately drowning the deceased in the bathtub of her home, whereupon her body was placed in the fish pond on the premises to further the accidental appearance of her demise.

### I. Introduction of the Confessions

There was no force, violence, threats, coercion or any unlawful means employed that in anywise induced petitioner to confess his participation in the commission of the crime. He freely and voluntarily offered to speak and give his version of the affair after and only after the accomplice Hope had been apprehended by the authorities and had confessed the killing and related the manner and the method by which and the purpose for which it was accomplished. The apparent object of petitioner in speaking at this time when confronted with Hope's statement was to shift the responsibility for the taking of the life of deceased upon Hope. Of course, petitioner, when his confessions were offered in evidence by the people, strenuously objected to their introduction and gave testimony which raised a dispute as to whether the confessions were free and voluntary, and the court, under instructions offered by petitioner on the subject, left this question with the jury, a procedure well

recognized by law in the State of California. Under the authorities of this Honorable Court, before a conviction will be set aside on the ground that it was illegally obtained by the introduction in evidence of an alleged confession, three elements must be present, namely, (1) the confession must have been obtained by compulsion; (2) the fact that such compulsion must be shown by undisputed or uncontradicted evidence; and (3) the confession must be the sole or at least a principal part of the evidence upon which the conviction rests.

The evidence of the people given on *voir dire* examination overwhelmingly refuted the contention of petitioner herein, made at the trial, that he was beaten, threatened, frightened, questioned until he fainted, and confessed because of fear of a recurrence of such beatings. Such evidence further refuted his contention that he was deprived of sleep and food and of his right to counsel.

Before petitioner made any confession of his participation in the commission of the alleged crime, he was while confined in the county jail confronted with a statement made by his accomplice Hope and was asked if he had anything to add thereto and replied "nothing." Under the law of California, when a person, under conditions which fairly afford him an opportunity to reply, stands mute in face of accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilty. Later in the

day, while being interviewed in the office of the district attorney, he said, "Why don't we go out and get something to eat and I will tell you the story." He was taken to a cafe in a prominent business portion of the City of Los Angeles where he freely and voluntarily related the circumstances relative to his participation in the murder of the deceased. He reiterated his story shortly thereafter in the office of the district attorney in the presence of a stenographic reporter, at which time he stated that he never would have told the story if Hope hadn't told it. He knew that he was not required to talk about the matter because he had been told by his own counsel, Mr. Silverman, before he had made any statement regarding the crime, that if the officers questioned him to tell them he wouldn't talk unless Mr. Silverman was present.

Furthermore, petitioner's guilt was established by evidence independent of any confession made by him. Hope in his testimony related facts and circumstances which incriminated petitioner in the death of the latter's wife, and Hope's testimony was corroborated by other evidence which tended to connect petitioner with the commission of the crime. The instant case does not present a situation where a defendant, whose guilt was not otherwise established, was convicted solely by evidence of a confession wrung from him while he was dominated and his mind subjugated by officers of

the law. To the contrary, it presents a situation where the guilt of petitioner was established by evidence independent of his confessions and where petitioner seeks to escape just punishment for his brutal crime by falsely claiming that the confessions, which were part of the proofs against him, were obtained by brutal and coercive methods.

## II. Introduction of the Rattlesnakes

The bringing of live rattlesnakes into the courtroom and exhibiting them to the jury did not create a state of fright upon the jury. This is apparent from the fact that defense counsel at a later time in the trial and during the development of the case by the defense again produced the snakes and thus risked a repetition of the situation of which complaint is here made. At the time the snakes were brought into the court room and at all times during their presence before the jury, they were confined in a substantial enclosed box with sufficient glass to permit the snakes to be seen. They were identified as the two snakes that were sold to the accomplice Hope two days prior to deceased's death, one of which Hope testified was the snake employed by petitioner and him to inflict a poisonous bite on the deceased's left foot when it was pushed by petitioner into the box containing the reptile. The autopsy surgeon had testified that he found a laceration on the surface of deceased's great left toe; that her left foot was considerably swollen and

discolored, the swelling extending up to the hip, and that deceased's lungs contained a considerable amount of water. He gave as the cause of death, "drowning and acute cellulitis (swelling) of the legs." He further testified that cellulitis resulting from a bacterial infection would take from two or three days to a week to reach the extent it had in the deceased but that if caused by animal poisons it would progress much faster; that the cellulitis present in the deceased was not of the bacteriological type but was of the animal poison type and could have been caused by the bite of a snake; that when he again examined the deceased's body following its disinterment he was of the opinion that the laceration on the deceased's toe was caused by a rattlesnake bite. Similar evidence was given by Dr. Gustave Boehme, an expert on snakes and snakebites. It is a fundamental principle of law that the medium employed to bring about the violent or untimely death of the victim is admissible in evidence as part of the res gestae. Such evidence is not to be suppressed merely because it may strongly tend to agitate the jury's feelings. As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation. Moreover, the production of the identical snakes tended to corroborate the testimony of the prosecution witnesses and to otherwise sup-

port the case of the people. If the prosecution had failed to produce said snakes, this fact would have weighed heavily against its theory of the case.

### III. Admissibility of the Colorado Affair

At first blush the death of the wife of petitioner appeared to have been free of any criminal agency. The burden of proving that her death was not accidental but was caused by the use of criminal means rested upon the prosecution. The fact, if capable of being proved by the prosecution, that a former wife of the accused had been found dead under circumstances similar to those surrounding the death of the one for which he was on trial, would tend to give credence to such other evidence in the case showing that the deceased had been murdered, which evidence otherwise might seem doubtful, especially when given by an alleged accomplice. There is no provision of law in the State of California which requires, nor does the due process clause of the Federal Constitution require, that such matter be charged in the indictment or that previous notice of the use of such evidence by the prosecution be given to the defendant.

However, such evidence did not come without notice to petitioner for he was questioned prior to his indictment about the death of his former wife, Winona James, and at the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. Peti-

tioner had the right to take depositions of witnesses who resided outside of the State of California and offer such depositions in evidence if he so desired but which he failed to do. After the trial had been in progress for a number of weeks, he requested a continuance thereof to take depositions but his request was denied for insufficient showing therefor, as required by the law of California, namely, the filing of affidavits in support of such motion for continuance setting forth facts warranting the trial court in granting such application.

Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder where the proof of such prior murder tends to throw light upon a particular fact or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which a defendant is on trial. It is the settled law of California that where the accused is on trial for the murder of his second wife the prosecution may introduce evidence as to the death of the first wife and the fact that her life was insured with the accused as beneficiary to show the motive of accused in the murder of his second wife. Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to such an inference, proof of other acts of the same general character is admissible to show that the act in question

was the product of a designing mind rather than the result of mistake, accident or misfortune. In its instructions to the jury, the trial court properly limited the purpose for which the jury might consider this evidence.

### IV. Affidavits of Witness Hope

The affidavits of the witness Charles H. Hope, wherein he states that his testimony was false and known to the prosecution to be false, were filed in connection with a motion to set aside the judgment rendered upon his plea of guilty to the murder of Mary James, which motion was presented to the trial court approximately three years after he had been sentenced to imprisonment in San Quentin for life. Petitioner has made said affidavits a part of the record herein by including them in his petitions filed in the Supreme Court of the State of California for a rehearing and for a writ of habeas corpus. Obviously, the matter set forth in the affidavits was not a proper subject to be considered by said Supreme Court for a rehearing, but it could have been and evidently was considered by said court on the petition for a writ of habeas corpus. As to the latter petition the said court had before it the record in the case, which was included in the petition by reference. Consequently, said court had before it a great mass of evidence which was entirely in conflict with the statements contained in Hope's affidavits. The overwhelming weight of the

evidence as disclosed by the record was to the effect that Hope had not testified falsely and that his belated claim to that effect was merely the effort of a guilty man to escape the punishment which he was suffering for his crime. The petition was denied without prejudice, thereby leaving the matter in such state that if the petitioner could thereafter make a reasonable and clear showing of his right to a writ of habeas corpus, the Supreme Court of California was still in a position to grant such writ.

## V. Right of Counsel

The record does not bear out petitioner's assertions that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed counsel of his choice; that thereafter he was held in jail in the "High Power Tank", and was constantly under observation and his counsel visited him only once, and that he was told, when he asked the officer to call attorney Parsons, it would take too long to inform Parsons about the case.

The record shows that petitioner had counsel of his own choice the day after his arrest who continued to see him at various times thereafter; that petitioner was taken before the superior court, the only court with jurisdiction in the matter where an indictment is found, within two days after his

arrest, and that the officers attempted to communicate with attorney Parsons but were unable to reach him because it was on a Saturday afternoon.

Petitioner's claim that a certain canon of professional ethics was violated in this case begs the question of the validity of a conviction for crime based upon competent and sufficient evidence.

Under the decisions of the appellate court of the State of California, an accusatory statement is not rendered inadmissible by the fact that the accused remained silent upon advice of his counsel.

## VI. Equal Protection of the Laws

Petitioner, in claiming that he was denied equal protection of the laws on the same grounds he claims he was denied due process of law, has misconstrued the purport of this constitutional guarantee. The equal protection clause of the Fourteenth Amendment of the Constitution of the United States has to do with the intentional and systematic discrimination by the law itself or by those charged with its enforcement and not with individual invasion of individual rights, nor with mere error of judgment on the part of officials of the law.

## ARGUMENT

### I. NEITHER THE DUE PROCESS NOR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WAS INFRINGED BY THE ADMISSION IN EVIDENCE OF PETITIONER'S CONFESSIONS

It is the contention of respondent that the evidence supports the conclusion reached by the trial court and jury that petitioner's confessions were free and voluntary and were not procured by virtue of third degree methods, or by prolonged questioning without sleep being accorded petitioner, or by the use of torturous means, mental or physical.

#### 1. Presentation and Discussion of Authorities

In approaching a discussion of the facts of this case it may be well to first refer to a few of the decisions of this Honorable Court and other Federal courts which, in our judgment, announce the correct rule of law applicable to cases where the confession introduced in evidence at the trial was procured by the use of such means and methods as rendered the conviction void, as violative of the due process clause of the Fourteenth Amendment.

One of such cases is *Ziang Sung Wan* vs. *United States*, 266 U. S. 1, 45 S. Ct. 1, (opinion written by Mr. Justice Brandeis), in which the facts showed without conflict that Wan was taken into custody in New York on February 1st, at a time when he was

sick in bed; that he was taken to the City of Washington, D.C., against his will; that he was kept in a room in a hotel until February 9th, being at all times sick; that on the eighth day after his arrest he was taken to the scene of the crime, shown the premises and various objects connected with the crime, and questioned from 7 p.m. to 5 a.m. without sleep; that on the tenth day he was again questioned at the scene of the crime; that on the eleventh day a formal confession was taken and was signed and initialed by him; that on the thirteenth day he was visited by the chief medical officer of the jail who found him lying on a bunk in his cell seriously ill and very weak, exhausted, emaciated, complaining of intensive abdominal pain and vomiting if he attempted to take food; that his bowels were difficult or impossible to move unless assisted by an enema; that he was in bed for a month thereafter under the case of this doctor who expressed the opinion that at the time he saw Wan on February 13th, Wan had been ill for a matter of weeks and was in such bad condition that he would have signed a confession, which would lead him to the gallows, "if he wanted to be left alone," and that "he would do anything to have the torture stopped." This was the uncontroverted evidence touching the circumstances and conditions under which Wan's confession was obtained.

The Court said:

> "The undisputed facts showed that compulsion was applied. As to that matter there was no

> issue upon which the jury could properly have been required or permitted to pass. The alleged oral statements and the written confession should have been excluded."

Mr. Justice Brandeis stated the question at issue as follows:

> "The main question for decision is whether, on the facts disclosed in the testimony of the superintendent of police, three detectives and the chief medical officer of the jail, the trial court erred in admitting as evidence statements made by the defendant to the police officers before and shortly after his formal arrest."

The court of appeals in the *Wan* case appears to have held prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary as a matter of law if it was not induced by a promise or a threat, and that there was evidence sufficient to justify a finding of fact that these statements were not so induced.

This Honorable Court held, however, that a confession obtained by compulsion, even though not induced by a promise or a threat, must be excluded whatever may have been the character of the compulsion and that the circumstances of Wan's having been subjected for seven days to interrogation before making the first of several confessions, in view of all of the circumstances, was sufficient to show compulsion.

In the case of *Brown* vs. *State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682, on writ of certiorari to the Supreme Court of the State of Mississippi, in an opinion written by Mr. Chief Justice Hughes, it was held that the use of a confession obtained by coercion, brutality and violence as basis for conviction and sentence, constituted denial of due process under the Fourteenth Amendment of the Constitution of the United States.

The facts in that case are important. In the first place, the convictions rested *solely* upon confessions shown to have been extorted by officers of the State by brutality and violence. Aside from the confessions, there was no evidence sufficient to warrant the admission of the case to the jury. The confessions were received over the objections of defendants' counsel. There was no dispute as to the facts with relation to the manner in which the confessions were obtained. These facts are briefly as follows:

As to the defendant Ellington, he, an ignorant Negro, was taken from his home by a number of white men including a deputy sheriff, who took him to the home of the deceased and accused him of the crime. Upon his denial they seized and hanged him by a rope to the limb of a tree, let him down, then hanged him again, and when he was let down the second time, still protesting his innocence, he was tied to a tree and whipped. Still declining to confess, he was finally released and returned with

some difficulty to his home. The evidence showed that the signs of the rope on his neck were still plainly visible at the time of trial. A day or two after the foregoing ordeal he was arrested and taken to the jail in an adjoining county. On the way to the jail the deputy in charge of him stopped and again severely whipped him and continued to whip him until the defendant agreed to confess. Upon reaching the jail he did confess.

The defendants Brown and Shields, also ignorant Negroes, were arrested and taken to the same jail, where the same deputy, accompanied by a number of white men, made them strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were informed that the whipping would be continued until they confessed in detail as demanded by those present. The defendants did confess, and as the whippings progressed and were repeated, they changed or adjusted their confessions in all particulars of detail so as to conform to the demands of their torturers. There was other evidence of brutal treatment It was said by the Court to read "more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."

The confessions were obtained on April 1st, repeated on April 2, 1934. Defendants were indicted on April 4th and tried on April 5th and 6th. The

evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable.

This Honorable Court stated that by the undisputed evidence the confessions had been obtained by the brutal methods above described, and said:

> "The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

It then ordered the judgment reversed.

In *Chambers* vs. *State of Florida*, 60 S. Ct. 472, decided by this Honorable Court on February 12, 1940, in an opinion written by Mr. Justice Black, the "grave question" presented by the petition for certiorari being whether the proceedings in which confessions were utilized and which culminated in sentences of death upon four young Negroes in the State of Florida failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, this Court first succinctly stated the rule governing this matter as follows:

> "However, use by a State of an improperly obtained confession may constitute a denial of

**due process of law as guaranteed in the Fourteenth Amendment."**

The facts showed that an elderly white man was robbed and murdered. After discovery of this murder, from twenty-five to forty Negroes living in the community, including the defendants, were arrested. Some of the Negroes, including two of the defendants, were taken from jail to another county for incarceration. During the ride one of the guards stated in the hearing of defendants that they were being taken to escape a mob. Later these Negroes were returned to the original jail. It was clear from the evidence of both the State and the defendants that for a period from May 14th to May 20th these Negroes, including defendants, were subjected to questioning and cross-questioning. There was no time during the week in which they were permitted to see or confer with counsel or a single friend or relative. The officers were in the jail almost continually during the week questioning the Negroes in connection with this case. The testimony was in conflict as to whether the defendants were continually threatened and physically mistreated until they confessed. However, according to the opinion of this Honorable Court, it was *certain* that by Saturday, May 20th, five days of continued questioning had elicited no confession. At about 3.30 o'clock on Saturday afternoon a "concentration of effort" was brought to bear upon a number of prisoners, including

defendants, which resulted in continuous questioning through the night till sometime in the early hours of the following morning when one of the defendants "broke," whereupon the State's Attorney was awakened and brought to the jail, but after hearing the confession then obtained was dissatisfied with it. Consequently the questioning was continued, and just before sunrise confessions were obtained which were satisfactory to the State's attorney. One of the confessing defendants pleaded guilty. The Court said:

> "When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff 'were in the Court room sitting down in a seat.' And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions."

In passing upon the issue of whether the proceedings afforded the safeguard guaranteed by the Fourteenth Amendment, this Court pointed out specifically that there were certain "undisputed" facts, certain "admitted practices" and certain matters shown "without conflict," and we direct the attention of this Honorable Court particularly to that circumstance as being important in consideration of the instant case.

We quote from the opinion in *Chambers* vs. *State of Florida*, as follows:

> "Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by State officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown* v. *State of Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'the undisputed facts showed that compulsion was applied'."

The case of *White* vs. *State of Texas*, 310 U. S. 530, 84 L. Ed. 1342, is cited by petitioner.

The facts in this case are that defendant, an illiterate farm hand (apparently a Negro) was held in jail for several days without charges being filed against him. He was without legal counsel and out of touch with friends or relatives; on several nights during this period he was taken handcuffed by armed guards out of the jail and into the woods for interrogation; while in jail the sheriff put defendant by himself and kept constantly watching and talking to him; a confession was obtained

after this process by an interrogation of the county attorney from 11.00 p.m., to 3.30 a.m., during which period the officers who had been out to the woods with the defendant were in and out of the room. The defendant claimed that while out in the woods he was whipped and a confession was demanded of him and that he was warned not to tell that he had been out in the woods. This statement of the defendant was controverted by the officers who, however, did not controvert the other matters above referred to. The state's case against the defendant rested substantially upon the confession thus obtained.

This Honorable Court cited and quoted from the case of *Chambers* vs. *State of Florida, supra.*

Certain obvious distinctions between the facts in the case of *White* vs. *Texas*, and those in the instant case are obvious. The petitioner in this case is not an illiterate farm hand, but, on the contrary, the owner of a barber business, the employer of several barbers, and a man who for a long period had dealt with insurance agents, and whose language as shown by his confessions and by his testimony was responsive, lucid and intelligent. Nothing happened to him comparable to the systematic taking of the defendant out into the woods in the middle of the night as testified in the *White* case, nor was he, as in that case, deprived of counsel. Moreover, when he did confess he did so as a result of a voluntary determination on his own part and made the

confession, in the first instance, to individuals who are not asserted to have participated in any manner in the prior questioning of petitioner.

The foregoing are four of the decisions of this learned Court which apply and establish a rule which we believe may be stated, as indicated by those cases, as follows:

Where a conviction rests solely or principally upon a confession or confessions, and where it appears without conflict that such confession or confessions were obtained by any means amounting to compulsion, the rights of the individual convicted by the use of such confession or confessions, under the due process clause of the Fourteenth Amendment of the Constitution of the United States, have been violated and this Court will, in an appropriate proceeding brought for that purpose, set aside such conviction and any judgment resulting therefrom.

The foregoing statement includes, as we construe the authorities, the following elements:

(1) The confession must have been obtained by compulsion.

(2) The fact of such compulsion must be shown by undisputed or uncontradicted evidence.

(3) The confession must be the sole or at least a principal part of the evidence upon which the conviction rests.

Stating the rule conversely, if our analysis of those decisions is correct, this Honorable Court will not interfere with the judgment of conviction where

the confession is procured under such circumstances that it is not clear that it was obtained by compulsion, or where there is a conflict on that question as a result of which conflict the trial court in the first instance would be justified in holding either that there was or was not compulsion, or where it appears that the conviction of the accused is supported by substantial evidence independent of the confession.

Our conclusion, with reference to the matter of the rule where a conflict in the evidence appears, is supported by several decisions to which we direct the attention of this Honorable Court. Preliminarily, it may be said that the three cases heretofore cited appear to recognize the rule to be that where there is a conflict of evidence as to whether the confession is or is not voluntary, and the trial court determines that it is voluntary, the decision of the trial court on all points as to which there is a conflict will not be disturbed by an Appellate Court. This is suggested by the stress that is laid in those three cases in pointing out that the evidence was "without conflict" or "undisputed" or "conclusive" or "admitted."

In *McAfee* vs. *United States*, 70 App. D. C. 142, 105 F. (2d) 21, 24, it is said:

> "Under the law and practice in this jurisdiction, the duty of a trial judge in respect of an offered confession is first on voir dire to determine whether or not there is evidence upon

which the confession might be held to be voluntary. If he concludes there is no such evidence, then he must exclude the confession from the case. But if, in his view, there is evidence from which it might be held to be voluntary, he must admit it in evidence and submit it to the jury under proper instructions."

In *Wilson* vs. *United States*, 162 U. S. 613, 16 S. Ct. 895 (quoting from page 624 U. S. Reports), it is said by this Honorable Court:

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant."

See, also, *State* vs. *Strable*, 293 N. W. 441, and *People* vs. *Lehew*, 209 Cal. 336, 287 Pac. 337.

The facts stated in petitioner's brief with reference to the circumstances of his arrest, detention and confession are in many important particulars not supported by the record, and in other important details are contrary to the record. In numerous instances petitioner in his brief refers, as supporting statements of fact, to the dissenting opinion of the Supreme Court of California and not to the evidence adduced at the trial. In some instances a fact is stated to be as testified by petitioner, himself, although the record shows that his statement in that respect was controverted.

For instance, he states that petitioner was taken into custody and removed from his house without any warrant or other legal process and without any reasonable or probable cause at the time. The fact is that he was arrested while actually engaged in the presence of officers in committing the crime of incest. (R. 456, 458, 463.) Under California law a peace officer is authorized to make the arrest for a public offense committed in his presence. (California Penal Code Section 836.)

The brief states: "He was taken to the county jail and placed in a private tank known as the 'High Power Tank' without any charge being preferred against him, where he was kept under constant surveillance and never allowed to be alone, even in jail."

The record shows that upon being placed in jail he was "booked" on the charge of incest. (R. 464, 578.) On the same day he was arraigned in court on this charge (R. 483); there is no evidence that he was placed in a "private" tank. There is no evidence that he was "kept under constant surveillance and never allowed to be alone, even in jail." On the contrary, it appears that his own attorney saw him several times during the period that he was in jail. (R. 481-484.)

The brief states: "He was continuously questioned while he was in jail and was repeatedly removed from jail at all hours of the day and night for questioning."

The record shows no single instance of petitioner's being questioned while he was in jail, except the one time on the morning of May 2d when he was confronted by his accomplice, Hope, and accused of complicity in the murder of his wife (R. 616-618); and the record shows no single instance of his being removed from jail, except the one time on May 2d when he was taken out of jail by a duly authorized deputy sheriff for questioning by the district attorney. (R. 618-619.)

The brief states: "He was at all times denied the right to the consultation with an attorney for days, until he was lodged in the county jail, at which time he was permitted to see an attorney on one occasion."

The facts as shown by the record are: (1) that he saw and consulted with his attorney the day after his arrest and the day before he was "booked" in the county jail (R. 571, 483); and (2) that he was accompanied by his attorney at the time of his arraignment on the incest charge and saw him in jail a number of times thereafter between that date and the date of his indictment for murder. (R. 483, 481, 482.)

(See, also, our argument under Point V.)

Too much of the time of this Honorable Court would be consumed by detailed analysis of the numerous misstatements of fact contained in petitioner's brief. However, we herein set forth in detail the true facts as shown by the record, with

careful citation of the record, and ask that the court consider the statements of fact set forth in this brief and sustained in every instance by the record. Such examination will demonstrate that the comparison in petitioner's brief of the purported facts of the instant case with the facts of the cases of *Chambers* vs. *State of Florida*, *White* vs. *State of Texas*, and *Brown* vs. *State of Mississippi*, *supra*, is invalid because petitioner's claims as to the purported facts in the instant case are not supported by the record.

(See our "Discussion of evidence adduced on voir dire examination," infra.)

## 2. Voir Dire Examination

It was the contention of respondent at the trial and still is that petitioner was not subjected to brutality or inhuman treatment, to force or violence, to threats or any other compulsion, and that he did not make the confessions introduced in evidence at the trial because of any one or more of such matters. He testified, it is true, that he was beaten, that he was threatened, that he was frightened, that he was questioned until he fainted, and that he confessed because of fear of a recurrence of such beatings. That was his story. The evidence produced by respondent, however, overwhelmingly refuted this contention, not only by express and direct testimony of witnesses, but by numerous circumstances which tended to discredit the testimony

of the petitioner and which impeached his veracity generally.

The trial court, in order to determine in the first instance, as a matter of law, whether the confessions proposed to be offered in evidence by respondent were voluntary, permitted evidence to be adduced on voir dire examination. This voir dire examination involved the testimony of many witnesses called by both petitioner and respondent and consumed a number of days of the trial. At the conclusion of the presentation of all evidence offered by the respective parties on this issue, the trial judge held the confessions to be admissible, adopting the theory, which is the law in the State of California as well as in the Federal Courts, that where there is substantial evidence which would warrant the conclusion that the confessions were voluntary, even though there be a conflict, the confessions will be admitted in evidence, and the jury will be properly instructed that if they believe the confessions to have been obtained voluntarily they may consider the same, but if they are of the opinion that they were not voluntary they should be rejected. Such instructions were given in the instant case as offered by petitioner. (R. 1119-1122.)

## A. DISCUSSION OF THE EVIDENCE ADDUCED ON VOIR DIRE EXAMINATION

### A-1. Petitioner's Evidence

We now purpose to discuss in some detail the evidence bearing upon the question of whether the confessions were voluntary or involuntary. The petitioner testified that he received a long, terrific beating at the hands of detectives Southard and Griffen; that it was inflicted during the night of April 20th and resulted in his receiving a hernia; that he was rendered "black and blue from my waist up"; that as a result of which "both of my ears were swollen so that I couldn't hear" (R. 485, 492, 494); that on the nineteenth of April he was threatened by Southard and Griffen; that they "had known about my killing my wife and I had just as well confess it to them or they were going to beat the hell out of me (R. 489); that at about three or four o'clock in the morning on the night between Sunday and Monday (April 19th and 20th) Williams, the deputy district attorney in charge of the investigation, told him he had authority to give him a lighter sentence if he would come clean; that if he would tell the truth he would get a light sentence, maybe get off with manslaughter; that he was questioned long hours through Sunday and Monday, including Sunday night and Monday night without sleep, as a result of which he "fainted or passed out" (R. 493); that on April 19th he asked for his counsel, Mr. Silverman, and was informed

that Silverman was out of town, and that he then asked for a Mr. Parsons and was informed that Parsons said he didn't know anything about the case and it would take too long to look over the transcript and he couldn't see him. (R. 487, 488.)

Petitioner testified that he was placed in the county jail on April 21st and remained there, except during the time he was before the Court and the grand jury, until the second of May (R. 493, 494); that on the second of May he was taken to the chaplain's room of the jail and at that time he was still suffering pain from the injuries he had received and had a memory of the physical force that had been used upon him; that when there confronted by his accomplice Hope and accused of the commission of the crime by Williams, he was afraid to deny it. (R. 494, 495.) He testified that shortly after noon on May 2d he was taken to the district attorney's office by deputy sheriff Gray; that Southard was there; that at about ten o'clock that night the room was cleared of all except Southard who then told him that he, petitioner, had been lying to Fitts (the district attorney) all evening and that "you are going to tell the truth here and now or I am going to take you back to that house and I am going to beat your God Damn head off" (R. 496, 497) to which petitioner, according to his statement, responded that he was ill from the beating he had taken before and couldn't stand another beating and that he would gladly admit what

Southard was relating to him about his accomplice's story and save himself from further punishment. (R. 497.)

The foregoing is the substance of the testimony of petitioner on voir dire concerning the threats, promises and brutality claimed to have been suffered by him. In order that his testimony may appear intelligible it should be remembered that the events which led up to his confession were chronologically as follows:

### A-2. Chronological Order of Events

Shortly after nine o'clock on the morning of April 19, 1936, petitioner was arrested while in bed with his niece, charged with the crime of incest. He was taken to the house next door to the place of his arrest where the officers had the receiving portion of a dictograph installed and shown the dictograph, after which he was questioned for a short time (R. 457, 458, 560), then taken to the district attorney's office where he was questioned by Buron Fitts, the district attorney, and others for several hours. (R. 465, 560.) He was then in the late afternoon of April 19th (which was a Sunday) taken back to the house adjacent to his own home, where the dictograph was installed. (R. 470, 560.) He was kept there Sunday night, part of Monday, was taken out to view a house which he pointed out to the officers (R. 559, 568), was taken to the district attorney's office, was returned to the

original premises, there kept Monday night, and Tuesday morning he was taken to the district attorney's office and then booked in the county jail charged with the crime of incest. (R. 457, 458.) This was April 21st. On the same day he was arraigned in court and returned to the jail. There he remained until Saturday, May 2, 1936 (R. 493), when he was confronted by his accomplice Hope and accused of the murder of his wife. (R. 617, 630.) Later that day he was taken from jail by deputy sheriffs, taken to the scene of the murder of his wife, there questioned, and later returned to the district attorney's office, at about three or four o'clock in the afternoon of Saturday, May 2d. (R. 618, 619, 624.) He remained in the district attorney's office until about midnight of May 2d, when he was taken to a restaurant several blocks away by officers, at which time he ate a meal, following which, and at the restaurant, he made a statement to the officers in which he admitted complicity in the killing of his wife. Thereafter, he was taken to the district attorney's office at which place he arrived at about 1.30 a.m., May 3, 1936, and, in answer to questions by District Attorney Fitts and others, made a statement, taken stenographically, in which he again admitted participation in the killing of his wife. (R. 619, 620; 632-639; 640-660.)

## A-3. Facts Adduced on Cross-Examination of Petitioner

It should be noted that the only brutality or force or violence claimed by petitioner to have been inflicted upon him was inflicted at the time of his arrest between April 19th and 21st; that no confession was made by him during that period; that thereafter he was in the county jail in the custody of the sheriff and not of the district attorney, for eleven days during which time he appeared in court, as will be hereinafter brought out, and several times saw his attorney, and that the only complaint he makes of his treatment from the time he was taken out of jail on May 2d until he confessed on May 3d was that Southard threatened that unless he did confess, the beating which he claimed to have received on April 20th would be repeated.

On cross-examination, following his direct voir dire examination, above referred to, certain significant matters were brought out. First, petitioner stated that he did not admit any crime to Southard and Griffen following the beating he claimed to have received at their hands. (R. 497, 498.) Next, he admitted that prior to his appearance in the chaplain's room on the morning of May 2, 1936, at which time he was accused of the crime of killing his wife and failed to deny such accusation, he was not told that he was going to be beaten, nor was he threatened in any way nor was he offered anything. (R. 498.) He admitted that at the time he confessed to

District Attorney Fitts on the morning of May 3d he said, "There ain't enough men in the district attorney's office to make me talk. And there wasn't; if he (meaning Hope, his accomplice) hadn't told it you never would have got me to talk." (R. 501.)

He admitted that at the time of the conversation on the night of April 19th in which he claimed that Williams had offered him life imprisonment or perhaps manslaughter and had stated he was authorized to make such offer, a detective named Davis may have been present, that the first thing Williams said to him was that he was the deputy district attorney in charge of this case and wanted him, petitioner, to know that he was not in a position to make any promises or offers of any kind or character to him, and that any statement made by him to said Williams would have to be freely made. (R. 503, 504.)

He admitted that on the night of May 2d, while in the district attorney's office and before making any confession, at about 6 o'clock, he drank some coffee and wasn't sure whether he ate sandwiches or not. (R. 506.) He admitted that he went to dinner with deputies sheriff Killion and Gray and there made a statement to them, and admitted that he made a statement to District Attorney Fitts thereafter in the presence of Gray and Griffen, Southard and Mrs. Dorothy Adams of the district attorney's office. (R. 507.) He admitted that no threats or offers of reward were made to him at the

time he was in the presence of Mr. Fitts. (R. 505.) He also stated that neither Killion nor Fitts nor Gray ever laid a hand on him or threatened him in any way or offered him anything. (R. 507.)

### A-4. Facts Adduced by People's Witnesses Relative to Use of Violence

As opposed to the petitioner's claims of violence, threats and coercion, and in corroboration of his admissions on cross-examinations, many witnesses testified. Southard stated that he did not use any physical force upon petitioner other than to slap him once on April 20th (R. 464), and that the slapping was a result of the following circumstance as to which Southard testified:

> "I told Mr. James, 'It is a dirty shame, such a beautiful little girl and so well brought up and so well thought of by everyone, had to die in a fishpond, be drowned and then put there.'
>
> "And then James said, 'Aw, leave me alone and quit questioning me about her. She wasn't so much before I married her; she was only a little whore when I married her'; and I lost my temper and slapped him." (R. 477.)

Southard further testified that not only was that the only time he used any force or violence upon James, but he said that not to his knowledge did any other person use any force or violence on him. He further testified that at the time he had petitioner in custody during the month of April and after he had slapped him in the face, petitioner did

not make any statement with reference to whether he had or had not killed or attacked or injured his wife. (R. 478, 479.)

The witness Griffen (accused of being the other person who participated in the beating) testified that Southard slapped the petitioner in the face on the early morning of April 20th, his version being:

> "Mr. James said, 'She was not very much.' He said, 'She was a whore when I married her.' At that time Jack was sitting in a chair just opposite his chair and he reached over and slapped him, and I said, 'Take it easy, Jack.'"

He also testified that there was no other force or violence of any kind or character used upon petitioner during the time he was in his company, either before or after this incident. (R. 556.) The witness Dean testified to the same effect. (R. 601.)

The witness Martin (A District Attorney's detective) was with the petitioner the night of April 19th until 4.30 Monday morning and was again with him Monday afternoon and Monday evening until 9 or 9.30 o'clock; that no force or violence or offers or promises of immunity or reward were used in his presence; that the petitioner appeared cool and calm and not frightened; that petitioner told him on Monday evening that Southard had slapped him, but made no other complaint, and that at the time petitioner told of Southard's slap, petitioner did not appear to be frightened and his answers to questions were coherent and responsive. (R. 602, 603.)

The witness Robert P. Stewart, chief deputy district attorney of Los Angeles County, testified that during the 2d and 3d of May there was a conversation with respect to physical violence having been used upon petitioner. This conversation took place in the presence of Stewart, who testified as follows:

> "Mr. Fitts asked Mr. James how he had been treated by the boys. Mr. James said Jack Southard had slapped him. Mr. Fitts asked him what he had done. He said 'Nothing.' Fitts turned to me and said, 'Will you look into it.' I said I would, and I did."

Stewart testified that that was all he heard petitioner say with reference to any force or violence having been used upon him. (R. 594.)

On the question of the hernia which petitioner claims to have suffered as a result of his beating, Doctor George who examined him during the course of the trial testified he discovered a hernia which he had not seen when he made a less careful examination of the petitioner a number of months before, and that he had no idea how long that hernia had been in existence. (R. 462.) The witness Martin, however, testified that on the night of April 20th (before petitioner claims to have been beaten) petitioner told a Mr. Cavett in the presence of Martin that he had received a hernia at the time of an automobile accident in Colorado when the car went over the bank and he went down about fifty feet and fell out of the car. (R. 603.)

It will be remembered that James testified that he was so badly beaten on April 20th by Southard and Griffen that he was black and blue from the waist up and his ears so swollen that he couldn't hear. On the morning of April 21st, the next day, petitioner was booked in the county jail. At that time his clothes were taken from him, and he was given a bath and his body was examined while he was undressed by Deputy Sheriff Jack Williams, employed in the county jail, who testified it was a part of his duty to observe and make a note as to whether there were bruises or cuts or abrasions upon a prisoner when he came in; that such record is put on a log. He said he did not observe any black and blue spots any place on the body of petitioner or any cuts or abrasions and made a note of none and reported none. (R. 578, 579.)

The witness Phillips, another deputy sheriff employed in the jail, stated that he observed the petitioner with his clothes on at the time he was booked on April 21st; that it was a part of his duty in the jail to observe such matters when a man is booked because if there are any bruises the prisoner is sent to the hospital directly and a memorandum of such bruises is made. He said he observed no marks or bruises or discolorations upon the face or head of petitioner and made no memorandum of such because there "was not any to make notes of." (R. 579-581.)

The witness Peoples, deputy sheriff and chief jailor of Los Angeles County, testified that he talked to petitioner within two or three days after his admission to jail and that he observed no marks, bruises, scratches or mars upon that portion of petitioner which he could see, which was his face and hands, and that petitioner made no complaints to him of mistreatment. (R. 594, 595.)

### A-5. Facts Adduced as to Any Offered Inducement

Despite the fact that petitioner claimed to have been offered life imprisonment or even manslaughter by Deputy District Attorney Williams if he would confess during the conversation of the night of April 20, 1936, on cross-examination by Williams, petitioner testified as follows:

> "Q. And the first thing you said or rather the first thing that I said was that I was the Deputy District Attorney in charge of this case and I wanted you to know that I was not in a position to make any promises or offers of any kind or character to you and that any statement you made to me would have to be freely made by you?
>
> A. That is what you said." (R. 504.)

The witness Davis testified that he was with the petitioner before, during and after the only conversation claimed to have been had with Deputy District Attorney Williams at the La Salle Street

house following the arrest. Davis' testimony respecting this matter is as follows:

(Questions by Williams)

"Q. Yes Now, during the time that I was talking with the defendant, did I say to him in substance or effect that I had authority to promise him that if he made a confession he would not receive the death penalty, but would receive life imprisonment?

A. There never was any such statement made.

Q. And did I say to him in substance and effect that if his crime was not too heavy I might be able to get manslaughter for him?

A. You did not.

Q. Do you remember what I did say on the subject of authority?

A. Well, I recall specifically that you told the defendant that no one in connection with this case had any authority to promise him anything, that we were particularly interested in the death of his wife, and that if he had any story to tell us, we would be willing to listen to it." (R. 581, 582.)

## A-6. Facts Adduced Relative to Petitioner Being Deprived of Sleep

Despite petitioner's claim that he was questioned without sleep during the period from April 19th to 21st, it appears from the testimony of the witness Davis that petitioner did sleep from about three-thirty or a quarter of four in the morning of

the 21st until eight o'clock a.m., at which time petitioner had hot coffee in the kitchen; that thereafter petitioner went to a cafe near Ninth and Alvarado where the petitioner ate breakfast. (R. 583.) The witness Dean testified that petitioner slept Monday night. (R. 600.) The witness Griffin also testified that petitioner had a cup of coffee on the morning of the 21st and that he, Griffin, asked the petitioner if he wanted to eat and petitioner said he did; that Griffin "told the boys to take him out to eat." (R. 573.)

The witness Southard testified that during the period of time from April 19th to April 21st, petitioner was taken out for meals every time it came mealtime. (R. 471, 472.)

It therefore appears that there was evidence that the petitioner did have sleep and also ample evidence to the effect that he had his meals regularly during the period immediately following his arrest and before he was booked in the county jail.

### A-7. Facts Adduced Relative to Petitioner's Right to Counsel

The circumstances with reference to petitioner asking for counsel was testified to by several witnesses. The witness Southard testified that when petitioner was first in the district attorney's office, April 19th, he asked Mr. Fitts to get in touch with Mr. Silverman and "Mr. Fitts offered to get in touch with him and was unable to locate him," and

that he (witness) did not hear James thereafter express a desire to be represented by counsel. (R. 466.)

The witness Griffin testified that petitioner had a conversation with his attorney, Mr. Silverman, at the district attorney's office on Monday (April 20th). (R. 571.)

Mr. Silverman was called as a witness by petitioner and testified on direct examination that he did not see petitioner on April 21st but did see him on or about April 25th and on several days later. (R. 481.) On cross examination, Mr. Silverman admitted having appeared in the superior court at the time petitioner was arraigned on April 21st (R. 482, 483), and when further questioned as to when he had first seen petitioner after petitioner was arrested on the morals charge stated, "I don't know what date that was, Mr. Williams." (R. 484.)

The witness Killion testified that on one occasion petitioner asked if he couldn't have a chance to ask his attorney whether he should answer questions or not and was told that "we were attempting to get in touch with Mr. Silverman."

It was ascertained that Silverman was at Murrieta Hot Springs; that Mr. Fitts so informed petitioner; that petitioner then asked for Mr. Parsons. (R. 625, 626.)

Mr. Killion further testified that an effort was made to get in touch with Mr. Parsons but that

they were not able to. (R. 628.) Thereafter he testified as follows:

> "Q. Now, thereafter did Mr. James say anything that he didn't want to proceed without an attorney being present?
>
> * * * * *
>
> A. No, sir, he didn't say that.
>
> Q. By Mr. Williams: Did he thereafter ask for another attorney?
>
> A. No, sir." (R. 628.)

On the morning of April 21, 1936, petitioner was lodged in the county jail of Los Angeles County where he remained in custody of the sheriff of Los Angeles County until the morning of May 2, 1936. At the trial he made no complaint of receiving any mistreatment during that period of time. As already pointed out, he conferred with counsel on April 20th, he was accompanied at his arraignment on April 21st by counsel of his own choosing, and that counsel had at least one conference with him on April 25th, and saw him on several days thereafter until about a week later while petitioner was in jail. (R. 481-482.)

### A-8. Events on May 2d

On the morning of May 2d, at which time petitioner says he still had a memory of having been beaten in April and feared another beating and was afraid to talk, he was taken by Deputy Sheriff Killion, whom he met in the attorney's room on the 10th floor of the Hall of Justice within the jail,

down a corridor along a cell block to a room known as the chaplain's room, same building, same floor. The only conversation had between James and Killion was that Killion said "Hello, James," or "Hello, Bob," and no other persons had any conversation with him. When he reached the chaplain's room, there were present in addition to James and Killion, Deputy Sheriff Gray, and also Lynch, a statement report of the sheriff's office, Griffen and Southard. Nothing was said. Hope was then brought into the room, at which time the first word said by anyone was by Deputy District Attorney Williams. Killion further testified that there was no force or violence used upon petitioner by anyone; that there were no offers or promises or hope of immunity or reward extended to petitioner; that no threats were made; that all statements made by petitioner were freely and voluntarily made; and that immediately following the statements, hereinafter set forth, petitioner was returned to the attorney's room by Killion. (R. 616-618.)

### (2) Accusatory Statement

The statement made by Deputy District Attorney Williams to petitioner at that time was in the nature of an accusatory statement. Said statement and petitioner's responses thereto are as follows: (R. 630, 631.)

"'By Mr. Williams: Q. James, do you knew this man Chuck Hope?

A. Yes, I know him.

Q. Now, Chuck Hope told us this morning that on the 4th day of August, the day before your wife was killed, he came out to your house; that on the day before that, at your request, he had purchased and delivered to you three rattlesnakes; that he came to your house between 11 and 12 o'clock on the Sunday, the 4th of August; at that time, he went into the house, and you had your wife in the breakfast nook strapped or tied on the table with her mouth bound with adhesive tape and adhesive tape over her eyes; that he brought the rattlesnakes in and you put her left foot into the box of snakes with your hand and one of the rattlesnakes bit her.

"'After that, he went away with your automobile and took the snakes and returned them to Snake Joe in Pasadena where he had gotten them. He came back about 1 o'clock Monday morning, that same night but after 12 o'clock, and at that time, he met you out in the garage, and you told him out there that your wife was not yet dead.

"'He said that you had some drinks; that you left him; at 4 o'clock you came out and said—no, that is not correct—at 1 o'clock you told him you were going to drown her in the bath tub. At 4 o'clock you came out and told him that she was dead. Then you went back into the house and about 6 o'clock or 6:30 you came into the garage again and told him she was dead, that you had the mess all cleaned up and for him to come in and help you carry her out.

"'He went into the house. She was lying in the hallway between the bathroom and kitchen door. You picked up the head portion of her

body. He picked up the feet or legs. You carried her out to the fish pond, right alongside of the fish pond and he laid her down alongside the fish pond. She was dead at that time.

"'He left and went and got into the automobile. You stayed and put her body into the fish pond and then came out and got in the automobile. In the meantime, you had taken a lot of wet clothing and towels and put them in a bucket in the back of the automobile.

"'You went down to his apartment where he was living near Virgil Street, and he took this clothing and told you he would get rid of it. That included several blankets, some towels, a sweater and other clothing, and he did get rid of it.

"'He makes that statement. Have you got anything to add to it?

By Mr. James: A. Nothing.

Q. Nothing—that is all.'" (R. 630, 631.)

It will be noted that, prior to the making of this accusatory statement and the petitioner's failure to deny it, no word was said or deed done from which petitioner or any other person could have properly believed that in the county jail in the presence of a shorthand reporter and in the custody of the deputies sheriff, any person present intended to or would use any force or violence or threats upon him. No force was used; no threats were made; no promises were extended, and yet when confronted by his accomplice and told briefly of the matters of which he stood accused by his accomplice, he failed to deny that accusation.

### (b) Law of California Relative to One's Failure to Reply to Accusatory Statement

Under the law of California, when a person, under conditions which fairly afford him an opportunity to reply, stands mute in face of accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. (*People* vs. *Lapara*, 181 Cal. 66, 71.) The question of whether the circumstances were such as to fairly afford an opporunity to reply is left to the determination of the jury under appropriate instructions. Such instructions were given in the instant case. The jury under the evidence were justified in believing that petitioner was afforded an opportunity to reply and failed to do so and that such failure indicated his admission of guilt, i.e., participation in the crime of killing his wife as charged in the accusatory statement.

In the afternoon of the same day, (May 2d) the petitioner was taken by Deputies Sheriff Killion and Gray, pursuant to a court order, out of the county jail to La Canada, the scene of the death of Mary James, and back to the Hall of Justice and to the district attorney's office, where they arrived sometime in the middle afternoon. (R. 618, 619.) Petitioner, at the trial, made no complaint regarding this visit to the scene of the crime nor of receiving any mistreatment or of being threatened in any manner to make any statement relative to the death of his wife.

Killion testified that he remained in the company of petitioner at all times from the time petitioner was taken from the county jail, pursuant to a court order, until petitioner was returned to the county jail early the following morning; that during the course of the evening, petitioner requested to be taken to dinner; that petitioner's request was granted; that they, in company with Gray and Investigator Davis and a young lady by the name of Carmen Wastengs, went to a restaurant at Fifth and Figueroa streets, which is eight or nine blocks from the district attorney's office, where petitioner had dinner; that after dinner, he (Killion) had a conversation, hereinafter set forth, with petitioner following which petitioner was taken to the district attorney's office, where they arrived about one or one-thirty in the morning and a statement at that time was taken from petitioner which was finished at about three o'clock in the morning, after which petitioner was returned to the county jail. Killion testified that during the entire time he was in the company of petitioner that day, petitioner did not give the appearance of being afraid; that petitioner was cool, collected and seemed to show no emotion of any kind; that petitioner's answers to questions were responsive; that petitioner appeared to be rational and coherent; that no force or violence was used upon him, no threats were made, no offers or promises or hopes extended of immunity or reward, and that all statements made by peti-

tioner during that period were made freely and voluntarily. (R. 619-621.)

## A-9. Events of May 3d

### (a) Informal confession by petitioner

The conversation, which took place at the restaurant sometime between midnight and one or one-thirty on the morning of May 3d, was related by the witness Killion as follows: (R. 633-639.)

> "A short time before midnight, in the office next to the District Attorney's office, James said to me, in the presence of Mr. Gray, 'Why don't we go out and get something to eat, and I will tell you the story.' I said, 'All right.' Thereafter the persons mentioned went in my automobile to the restaurant at 5th and Figueroa, and upon being seated, I said to Mr. James, 'Well, do you want to tell us the story now?', and he said, 'No, let's have something to eat, first.' So we ordered a dinner. As I remember, we had a steak dinner. After the dinner was finished we bought cigars. Mr. James had a cigar, and he said, 'Now, you want to have this story?', and I said, 'Yes.' So, he said, 'All right; there is no hurry, is there?' I asked him if he wanted to go back to the office to tell the story, and he said, 'No, this is all right, isn't it?' I said, 'Sure, it is all right.' So he said that about July 4th of this year—of 1935, I mean, was when Mary, his wife, had gone to Long Beach. He said that Charles Hope came to his, James', house, in La Canada, and at that time his, James', sister, Mrs. Murphy, was living

there. James said that when Hope came he remembered the occasion, because of his having some game chickens, and Mrs. Murphy, his sister, was helping him with them in the garage. James said that Hope had no money, and no place to stay, and wanted to stay there. He said that Hope told him he had left his car down on Verdugo Road, and Mr. James said he noticed that Hope was drinking, in fact, he thought he was drunk, and that he didn't want Hope to stay there. He said that when Hope asked him if he could stay there all night, that since he didn't want him to stay, being drunk, he gave him a dollar to pay for a room in which Hope could sleep. Mr. James said that Hope came the next night about suppertime, and at that time he gave Mr. Hope a key to the place, and showed him the sun parlor as being the place where he could sleep, and that Hope stayed there on a Tuesday night. He placed the Tuesday night as being that of the Tuesday night after Mary had gone to the Dental Convention in Long Beach. He didn't know the exact date.

"James said the next Thursday after that Tuesday, he was alone and about 2 o'clock—I mean he was alone at the Italian Village at Los Angeles, and he got drunk there and he met Madge Reed——

* * * * * *

"He said that he met Madge Reed and a blonde beauty operator at that place, and that after spending some time with them, they drove his car home, and that some place along the way, he doesn't know where, the blonde went

away, that is she was not in the car anymore, and that he lost his memory then and didn't remember anything more until about midnight when his, James' wife, awakened him by bathing his face with a wet cloth. He said his wife laughed and said, 'Who was the woman that was here?' And he said he didn't remember. He said that his wife went back to Long Beach on Friday morning and that on Saturday, after that Friday, Madge Reed, came by his barber shop on 8th Street and she said to him, 'You owe me three dollars. I spent that for cab fare and lunch', and that he gave her five dollars at that time and that he never saw her again until after Mary's death.

"He said that Mary came from Long Beach on a Saturday and when she came she was sick, and on the Sunday following that Saturday his sister, Mrs. Murphy, was going back east and that he took her to the train on Sunday night. On Monday, following the day that Mrs. Murphy went east, that Mary was still sick and he took her to a Doctor George for examination. He said that they went to Santa Ana to get a marriage license and did get a license and were married on July 19th, and that after the time of their marriage on July 19th, that Mary was sick all the rest of the time of her life.

"He said that he and Hope had talked about the insurance on Mary's life. He said that Hope knew she had the insurance because he, James had told him that she had $5,000.00 insurance. He said that he and Hope drank together on many occasions. He said one thing Hope said, 'Why don't you bump her off and get some

money?' He said that Hope said, 'Let me do it.' He said that Hope would get drunk with him on many occasions, and each time they got drunk that they would talk about the insurance and about doing away with Mary. He said on one occasion, he and Hope discussed some way to get rid of her and Hope said, 'Drive her out in a car and I will hold her up and shoot her', and Hope said, 'There are many other ways.' He said that about that time, Hope brought some stuff in some sacks. He thought it was rattlesnake poisoning in a powder form and that Hope thought it was deadly. At that time they got drunk again and nothing definite was decided upon. That Hope continued to see him, and that Hope told him and Mary that he, Hope, was a medical student, and that Mary wished to have an operation performed, that she didn't want to become a mother, and they talked it over in her presence and she had been learning that, she told him, it seems, that she wanted Hope to do something to her to cause her to have a miscarriage.

"About that time, James says he didn't remember the date, but he said that Hope was away for about a week and he came back and said, 'Well, Mary was dying anyway. She is sick. Why don't you kill her and let us get the insurance?' And then he said that Hope sprang the rattlesnakes on him and told him about getting snakes. He said, 'I will go out and get a rattlesnake that will kill her quick.' He said on that occasion that they would get drunk again Hope said, 'I will go and get a snake.'

"He said it was arranged and he gave him $20.00 and that Hope came back with two boxes,

two snakes in one box and one in another. They put the snakes in the chicken house and locked the chicken house. He said, 'It must have been dog days, because those snakes wouldn't bite anything.'

"Then Hope got two snakes, he thought, in Venice, and at the time he got them he got a white rabbit and put the rabbit in the box with the snakes, and left that night—the night that they put the rabbit in the box with the snakes, Hope left the girl back to his hotel. He said he didn't know whether it was his girl or wife. In the morning, when he, James, looked at the rabbit and the snakes the rabbit was dead.

"He realized he was doing the wrong thing and he said to Hope, 'We are both nuts.' Hope said he had to have some money. He said to James, 'You have a job and I have nothing and we have gone so far now that we cannot quit. We have already committed a crime now with the thing we have done.' He said, 'You get a spider and try that,' and he brought some spiders and when Hope brought them, that James threw them out and that there was nothing done with them.

"A day or so after the spiders had been brought, Hope said he had found a place where he could get a real snake and Hope said to James, 'Let me take your car in the morning and I can get them.'

"He said Hope took the car and went to some place in Pasadena and brought them to the barber shop and they went home together on Saturday night.

"They took the snakes from James' car and put them in Hope's car and drove to El Canada and then they got drunk. And that was on Saturday night. He said that Hope and Mary talked about an operation, Saturday night, after they became drunk, Hope left.

"He, James, and Mary continued to drink on Saturday night, and Hope came on Saturday morning, and he was half tight, James said, and they got some more to drink, and got her tight. Hope said he was going to do the work, and James said that about 1:00 o'clock in the afternoon on Sunday, that he, James, took his automobile and drove away, after Hope had told him he was going to do the work. James said that he didn't know anything about any tape being used on Mary, but that he did know that Hope was going to kill Mary with the snakes within an hour. He said that he left at about 1:00 o'clock, and came back about 3:00. He said that Mary was apparently pretty sick, and she didn't know what had happened, but she was in bed very drunk. He said that when he spoke to her, she said that she was very sick, but she guessed she would be all right tomorrow, and she kept calling for him, for James.

"He said that he had Mary write the letter that had been—that was found on the table, the letter in the envelope addressed to Mary's sister in Nevada. He said that Hope then took the automobile and left, and James continued to drink all Sunday, and that Hope came back about 6:00 o'clock Monday morning and asked if Mary was dead, and James said, 'No, she is all right,' and Hope asked, 'Did the snake bite her?', and James

said, he didn't know. James said, 'She is all right.'

"And Hope looked at her leg, which was black, and he told James that he turned the snakes out, and he said, 'What will we do?' James said, 'I am going to get drunk.'

"Hope told James to go ahead, and he would finish the job, and he said, 'How are you going to do it?' 'I will set the house on fire, and in that way we can get everything.' He said, 'We cannot quite now. They will know about the snakes.' He said that Hope told him to go on to work, and that he was going to finish the work there. He said he got in his car and started to work, and he felt like taking a drive, and after he drove out on Wilshire Boulevard he then drove to his shop. He said that Hope came into his shop between 12:00 and 1:00 o'clock on Monday, and they went to Melody Lane for lunch. There Hope said to him, 'Well, I got rid of her.' James said, 'You burned the house?', and Hope said, 'No, I drowned her in the bath tub.' And James said, 'Well, you are the craziest son-of-a-bitch I ever saw.' He said they had a big argument there, and he told Hope, 'Don't you know they will throw me in jail tonight?' He said, 'I had a wife drown in Colorado in the bath tub, and I know I will be in jail.', and Hope said that she was too sick and drunk to know anything about it when he put her in the bath tub; he said that he put a belt around her arms, and tied her, and James then talked to Hope some more about the Colorado wife. James then said to Hope, 'Well, I went in with you, and I will take the rap. I

will have no defense.' He said that at that time he gave Hope $30.00. He had only $40.00 with him, and he told Hope at that time, 'I will take all the blame.' Hope told James that he had cleaned the house up good, and had taken the blankets, and sweater, and so forth, to his house, and had burned them up, and he then told James that he had thrown the body of Mary into the fish pond. Hope said that he had taken all of the evidence to his, Hope's house, and destroyed it. James said he then stated to Hope, 'You damned fool, did you burn up that stuff?', and Hope said, 'Yes.' James stated then that the woman—he said he didn't know whether it was his wife, or his girl, but he said, 'She will spill everything.', and Hope said not to worry about her, that he had enough on her to hang her, told James that he and the woman went to a party on the Sunday night preceding the date on which they were talking, and that she knew all about it, anyway, but she would be afraid to talk. James said he had a notion to call up, but was afraid that if he did that the woman would talk anyway, and he didn't want to have to kill them both. Hope told James that he took the snakes away, and while the woman was in the house at the party which they had attended, he turned the snakes out. He again assured James that he had enough on that woman to keep her from talking. Hope then told James while they were talking in the restaurant that some people had come while he, Hope, was in the house on Verdugo Road in La Canada trying to have the snakes bite Mary, but that he had had the blinds down, and the

doors locked, and he was in there with Mary, and he didn't answer the summons that had been given at the door. James said, 'That probably is when Ethel was there and left the note.' Hope had told James that if he could kill Mary as he had, that they could get double indemnity on the insurance, and they would split it 50-50. James said at that time he was afraid about what Hope had done, and thought he had better take some one with him when he went home, so he took Pemberton and the girl with whom he was keeping company, Viola Lueck, with him that night, as he didn't want to find her alone. He said, 'The rest of it that Hope has told you is true.' He said then he didn't see Hope any more from that day at lunch, which was Monday, August 5th, for about a month. He said Hope then began to come into the shop and mouch him for money. He said he had given him $100.00 on Sunday, August 4th; he had given him $30.00 when they had lunch; in the shop he had given him $25.00 on one occasion, some other amount on others, and one time when he had returned from San Francisco he had given him $100.00. He said that on an occasion or two he had a notion to kill Hope, but he knew that Mrs. Hope knew all about it, anyway, so he didn't want to do that. He said that Hope began to act very screwy in the shop, and he came in there and was talking about being picked up, so Hope told James that he was going to San Francisco again, and Hope was given $25.00 by James to go to San Francisco. He said that when the insurance cases were over, when he, James, got the $1700.00 in

insurance, Hope came to Los Angeles, and James gave him another $100.00 and told him he would share the $5,000.00 if he got it; that about two weeks before James was arrested Hope came one night, and was drunk, and was beefing, James said, and said that James told him, 'Well, we played and lost.' James said, 'I am not going to be chiseled anymore for money.' Hope said, 'If you don't give me some I will squeal.' James said, 'All right, squeal.' He said, 'Go ahead and squeal.' James said, 'Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the District Attorney's office to make me talk.' That is the end of the conversation that we had with James in the restaurant."

### (b) Compulsion Disproved by People's Witnesses

As heretofore pointed out, petitioner testified that about ten o'clock on the night of May 2d (which would be about two hours before he went out to dinner and made the statements just above set forth), he was threatened by Southard that he would "beat his God damned head off," if he didn't tell the truth. This was expressly denied by Southard. (R. 613.) Petitioner's testimony was also shown to be false by Killion's testimony heretofore set forth to the effect that he was with petitioner at all times during that day and evening; that from the time petitioner was taken from jail until he was returned to jail, no force or violence or threats of any kind were used

upon petitioner by any person. Petitioner's testimony was also shown to be false by the testimony of Mr. Stewart, Chief Deputy District Attorney, who testified that he was with petitioner almost continuously from the time petitioner arrived at the district attorney's office in the company of Killion and Gray at about one or two o'clock p.m. until petitioner left with them about midnight to have dinner; that he was with petitioner thereafter from about half past one or two o'clock on the morning of May 3d, until the confession made at that time to Mr. Fitts was completed, and that he (Stewart) stepped out for a short time at about six o'clock while petitioner had some coffee and sandwiches. (R. 587, 588.) Mr. Stewart, on cross-examination, explained that his expression "almost continuously" covered "my departure for a few moments or for five or ten minutes at a time," which occurred a few times during the course of the afternoon and evening. (R. 591.) He testified that he did not remember seeing Southard in the room with petitioner at all, except that Southard and Davis were present when petitioner made a statement which was taken in writing. He further testified specifically:

> "Q. Now, during the time that James was there in the office, and you were there also, was Southard, to your knowledge, ever in the company of James alone?
>
> "A. He was not, to my knowledge.
>
> "Q. Was there any person who, so far as your observation went, was continuously with James?

"A. To the best of my recollection Gray and Killion, or either of them, were with him at all times." (R. 594.)

From the foregoing it is obvious that while James claimed in his testimony that he was threatened by Southard, Southard specifically denied it and Killion and Stewart testified to circumstances which showed clearly that there was no opportunity for the making of any such threat by Southard as testified to by petitioner. The jury were justified in believing that petitioner did not tell the truth relative to being threatened.

### (c) Formal Confession by Petitioner

Upon the return of petitioner with Gray and Killion from the cafe where he made the long informal confession to the officers, and beginning about one-thirty in the morning of May 3d, in the presence of District Attorney Buron Fitts, Chief Deputy Stewart, Killion, Gray, and others, the formal confession, in question and answer form, was taken. District Attorney Fitts did most of the questioning. The statement was taken in shorthand by Miss Dorothy Adams, a statement reporter for the district attorney's office. We have heretofore reviewed the circumstances under which this formal confession was made. In addition to what has already been stated, it may be pointed out that Mr. Stewart specifically testified as to his observation of the petitioner during the period that the petitioner was in

the company of Stewart (which included the time of taking the formal confession), that petitioner was calm, rational and coherent; that petitioner's answers were responsive; that petitioner gave no appearance of fright; that there was no force or violence used upon him; that there were no offers or promises of immunity or reward held out to him or hopes of immunity or reward, and that all statements made by petitioner were freely and voluntarily made. Stewart testified that prior to the making of the formal confession in Mr. Fitts' office, no offers or promises or hope of immunity or reward were extended to petitioner and all statements made by him were freely and voluntarily made; that petitioner sat at the left of Mr. Fitts, at the end of the desk, very much in a relaxed attitude, smoking a cigar, perfectly composed and calm; that he was emotionless; that there was no emotion whatsoever shown by him, and that petitioner was just as calm and collected as anyone there. (R. 587-590.)

Miss Adams, the statement reporter who took the confession which she said started at 1.55 a.m., May 3, 1936, and ended shortly after 2.50 a.m. of the same date, reading from her notes taken at the time, testified to the following questions and answers: (R. 641-659.)

* * * * *

"A. Mr. Fitts: Mr. James, the boys have told me that you told the story. Mr. James: They have got it.

Q. Will you just begin in your own way and tell me the story that you told them down there?

A. It's a long one; it will take three or four days.

Q. All right, go ahead.

A. I started it the week my wife went to Long Beach, which was around July 3rd or 4th. This fellow Hope came to my house and said he was out of work, broke, and his gal threw him out and he didn't have any place to sleep. He was drunk. He drove up to my garage where my sister and I were doctoring some chickens that had the roup. I wouldn't let him stay that night and gave him a dollar and told him to go somewhere where he could get a bed. I said, "You get sober and come up tomorrow night. You are a good friend of mine and if you are in bad shape I'll let you stay here until you get on your feet." He said, "I'll be up here sober tomorrow", and so he did. He came up sober and stayed Tuesday night and Wednesday night. My sister was there. She met him and fixed our meals. Thursday night——

"'Q. When was this?

"'A. I'm talking about the first of July on.

"'Q. This conversation that you are giving us, when did that take place?

"'A. If you could tell me the date that she went to Long Beach on this convention which was around the 1st to the 4th of July, I could tell you the exact date.

"'Q. It was on Thursday following the 4th of July, 1935.

" 'A. As I said, he came up Monday night drunk after I had taken her to Long Beach Sunday.

" 'Mr. Gray: July 4th, 1935, came on Thursday.

" 'A. That is the wrong date, then. I took her to Long Beach on Sunday. It was earlier than the 7th.

" 'Q. Could it have been the last day of June?

" 'A. It must have been because she came back and was home a week before we were married and we were married the 19th.

" 'Mr. Fitts: What convention was that?

" 'A. It was a dental convention, and she had had a lot of dental work done, a special bridge, and they gave it to her free if she would model for them. She took a week off to go model. As I said, when I took her down Sunday, he came up Monday night. My sister was visiting me from Birmingham, and I gave him a dollar and said to come back the next night sober. He came back and stayed Tuesday and Wednesday night, and I gave him a key. He slept on a sleeping porch in front of the house. Thursday my sister said she was going to spend the night with Ethel—that's my niece. He wasn't coming home. He never came home all night; he may have gone and stayed the night with his girl. I didn't ask him. Thursday afternoon I went to the Italian Village and I got drunk. I didn't go back to my business. I met a couple of girls there and I danced with them all evening. I think it was about five o'clock when we left and I couldn't drive my car, and this girl said she was a good driver. She had

not been drinking much, and I told her I would give her $10 if she would drive me home. After we got in my car I got so drunk I passed out. She let this blond headed girl out somewhere and she took me home and put me to bed.

"'Mr. Gray: Who was that girl?

"'A. That is that Reed woman, Madge Reed. She got hungry and went out and got herself something to eat. Naturally I went to sleep, and while I was asleep my wife came home. Some dentist who lived close to us decided to come see his folks and brought my wife home with him. She came in and saw this woman coming out of the bathroom. The woman said, "Are you his sister?" That is what my wife told me. I was asleep and didn't know. She said, "No, I'm not his sister; I'm his wife. Who are you?" She said, "I'm just a friend of his. I brought him home, and he told me he lived here with his sister." So she told her she was my wife and she took her to the bus in the car to Montrose and put her on the bus. After putting her on the bus she came back home and I don't know, it must have been around midnight when she woke me up bathing my face with cold water. I said I was surprised to see her there, and she said yes, and she was surprised to see me here. I said, "I wouldn't have been if I had not gotten drunk." I said, "I meant to go to a picture show and stay out late." I said, "You should have told me you were coming home," and she said she didn't know she was coming home. She kept laughing and grinning and finally said, "Who was the woman you had here?" I couldn't

remember her to save my life. I think she knew the stupid condition I was in and was honest and hadn't any idea I had a woman there. She said, "You had a very pretty brunette here.", and she said, "I took her down to the bus and sent her home." So that was about all she said about it. She didn't seem to be mad. She wasn't a jealous woman.

"'Mr. Fitts: You are speaking now of Mary, your wife?

"'A. Yes. I believe it was Saturday this girl came by the shop—

"'Q. Meaning the Reed woman, now?

"'A. Yes. She said, "You owe me $3.00 for a taxicab. You nearly got me killed the other night. You told me your sister lived there. What did you tell me that lie for?" I said, "I was drunk. I might have told you anything when I was drunk." I said, "You didn't go home in a taxicab; my wife told me she put you on a bus." She said, "I didn't get on a bus; I got a cab, but I spent a dollar for dinner," and I gave her a $5.00 bill and she told me how sweet my wife was to her. I said, "I never did anything like that before and I suppose she knew I was drunk." Then she left me. She got the money at the barber shop; I gave her a $5.00 bill and she left.

"'Q. When did you first discuss with Hope the question of killing your wife, Mary?

"'A. When she was in Long Beach while he was there.

"'Q. While Hope was at your place and your wife Mary was at Long Beach?

"'A. Yes. Somehow or other he knew she had this insurance. Whether I told him or she told him I don't know. Anyway, he knew she had this insurance. After she came back he knew she was very sick. He talked to me and said, "She is going to die anyway; why don't you kill her?"

"'Q. What did you say to that?

"'A. I told him I couldn't do it. He said, "Let me do it." I said, "How would you do it?" "Well," he said, "I'll take her up here and I'll shoot her in a holdup." I said, "Yes, there have been a lot of people hung for that." So he had some kind of a white powder in a box. I don't know what it was., but he said, "I've got something right here. I have been working with a bunch of racketeers. You can just break the skin on your hand and rub a little bit on it and it will kill you in five minutes." I thought it was ridiculous. In fact, he wanted me to get one of my chickens and try it on it. He was drinking and I didn't pay any attention. That is where he sprung the story on me about the rattlesnakes. I never saw a rattlesnake bite anybody. He said, "These California rattlesnakes will kill you in fifteen minutes. I'll get a good couple of snakes and do the job myself." It was agreed upon that I would give him half the money.

"'Q. Half the money with which to get the rattlesnakes?

"'A. No, that I collected from the insurance. I gave him $20 and he went out, and the next day——

"'Mr. Gray: Just to interrupt you there, I think you will recall in your story before this point about the rattlesnakes, after he had talked to you about the powder, didn't you say that he went away for a little while and then he came back and told Mary that he had a medical student and could perform an abortion on her that she wanted performed? Isn't that correct?

"'A. Yes. When Mary came back from Long Beach she was pregnant and I don't recall just how he met her; it seems he came to the house and I introduced her. She asked me who he was and he told her he was a medical student and she asked me if he was, and I told her yes. After she had been sick there for quite a while she said she decided that she couldn't go through with having her baby. She said, "I can't make it; my health won't permit it." She wanted me to take her to a doctor. I was afraid to because she was in very, very bad shape. She said, "Hope tells me he is a doctor. Why don't you let him take care of it?" I said, "When I see him again I'll tell him about it." That was when he disappeared and I didn't see him for a couple of weeks.

"'Q. That was in June or July?

"'A. July, after she came back from Long Beach. So Hope got to going out to the house and he talked with her, visited her, and told her he was a medical student. So it was finally agreed that he would take care of her. That is where his story comes in, on Sunday morning that he was supposed to have performed the abortion on her was the Sunday moning that if

he put her foot in the box with the rattlesnakes, I didn't see it—was the morning he did it.

"'Mr. Fitts: Up to that time you two had agreed to have the snake bite her. Is that right?

"'A. Yes. He had gone out and got some; in fact he brought three up there.

"'Those are the ones he got in Long Beach?

"'A. I don't know, he never would tell. He had certain kinds of boxes made and he brought them up in a box. It was dog days and they were blind. They wouldn't bite anyone. He took those away and he brought two more back and they would bite but they didn't have anything in them.

"'Q. How do you know that?

"'A. Because he put rats, chickens, and a rabbit in the box with them. In fact he put a rabbit in the box with one of them and the next morning the rattlesnake was dead and the rabbit was walking around.

"'That was the second batch. You bought three altogether?

"'Yes. I laughed at him about his rattlesnakes and that was the time that I told him we would lay off of it. So he got a spell on him one day that he had found some hot ones. He said, "I have found a fellow in Pasadena who has some that will really do the work?

"'Mr. Grey: When did you bring the spiders?

"'A. That was somewhere in that time.

"'Q. Was that before you brought the last snakes?

"'A. Yes.

"'Q. By Mr. Fitts: What kind of spiders?

"'A. He took my car. He got it one morning from the place where I was getting it greased. I think he kept it about three days. He came back drunk. He told me a cock and bull story. He said he had gone to Phoenix to get these black widow spiders. He had a glass jar full and the top had holes in it.

"'Q. How long was that before you bought the third bunch of rattlesnakes?

"'A. That was just before he brought them. So he said, "All you have to do is throw them in bed with her and they will bite her. I laughed and threw his damned spiders out. He came over there to the shop and I said, "Hope, you are nuts and so am I. Forget about it." So he went away and he said he would. The next time I saw him he was drunk. He is nuts when he is drunk. He said, "Come out here; I have a tip where I can get some hot snakes," and I laughed at him. He said, "All right, it will cost you $6.00. You give me the $6.00 and I'll go over and get them."

"'Mr. Killion: When you had this conversation what was it you said to each other about having already committed the crime about doing what you had done with the snakes?

"'A. I didn't want him to get the other snakes. I said, "We will fool around and get in trouble." He said, "We already are. We have been hauling rattlesnakes around in the car, which is a deadly weapon and a felony." I didn't know anything about that. I said, "No one knows it but you and I." He said, "I know it, and you aren't

going to walk out on me now. You have a barber shop and you are making a living and I want to make some money." I gave him the money and he goes over and gets the two hot snakes.

"'Q. What day was that?

"'A. Saturday night before she died Monday.

"'Q. How much did you give him?

"'A. $6.00.

"'Q. Was his wife along at the time?

"'A. Yes.

"'Q. Does she know anything about that, what the snakes were to be used for?

"'A. To a certain extent. So he came back Saturday night and met me at the shop and he took me home and we got drunk together.

"'Q. Tell about the transfer of the snakes in the service station.

"'A. He brought the snakes back from Pasadena in my car. He put them in his coupe and followed me to my house. I had a pint of whiskey. We drank and my wife drank with us. She dearly loved booze. No matter how sick she was she loved a drink. He had the two rattlers with him. He put them in the garage.

"'Q. Where?

"'A. The garage.

"'Q. What were they in?

"'A. In a wooden box with a glass top on it. I don't know where he got the boxes. He said he had them made somewhere. He had one in each box. So he put them in the garage and locked the garage up, and some time during the night he got in his coupe and left. He said, "I'll be back up here in the morning."

" 'Q. And before he left that night, while you were drinking, he talked over with Mary again the performing of the abortion that night?

" 'A. Yes, he promised that he would come back the next day and perform the abortion. So she was very happy to do it. So the next morning, I don't think I ever quit drinking. I think I drank along all night, and I was pretty tight when he got there that morning.

" 'Mr. Fitts: What time did he arrive?

" 'A. Around 11 o'clock. I gave him practically all the money I had, and $100, and I left, and as to what he told me about her being taped and tied up, I don't know. He took care of that himself. I left there about one o'clock and I think I returned about four. He said she would die in an hour, or fifteen minutes. I returned about four o'clock Sunday afternoon and I went in to see her and he had her full of liquor. In fact, he was very drunk himself. There were two or three bottles setting in the room where they had been drinking.

" 'Mr. Killion: What did he tell you when you left at one o'clock? Did he tell you he was going to do the work?

" 'A. Yes. I told him I couldn't have anything to do with it because she had been too good to me, and I just couldn't have anything to do with that part of it. I was very drunk and I got in my car and left, and I just drove around. I went back about four o'clock and asked him how she was. He was so drunk he hardly knew what he was doing himself. I stayed there a while and she didn't complain about anything bothering her at all.

"'Mr. Fitts: What was she doing when you got there?

"'A. In bed covered up. So he took the car and left and he stayed until about six o'clock the next morning.

"'Q. Where were the rattlesnakes at that time?

"'A. He took them with him.

"'Q. Did you see him bring the rattlesnakes in the house?

"'A. I didn't see them in the house. I saw them in the garage.

"'Q. Did he tell you he had her bitten by the rattlesnakes?

"'A. When I came back, he did.

"'Q. What did he say?

"'A. He said he put her foot in the box with one and it bit her three times. He said, "I don't know what's the matter with her. Unless the snakes has bitten so many times he's not poison. It doesn't have any effect on her at all." I talked with her and she was drunk.

"'Q. What did he say he had done?

"'A. He said he had inoculated her in the leg and performed the abortion and her leg hurt. She kept complaining and that was the first time I saw if after he left. His wife was waiting for him on the corner all the time in her car. He stayed all night. He left me with her. Naturally I was all upset and she and I just sat there and drank all night. I don't think she ever felt her snake bite. So he came back about six o'clock the next morning and her foot and ankle were swollen. I said, "She's all right, nothing the

matter with her", and we talked her over and I said, "What are you going to do about that? We had better call it off." He said, "We have gone too far. They will know it's a snake bite and she is going to talk, and we have gone too far to stop." I said, "What are we going to do with her?" He said, "You leave that to me. You go on and go to work and I'll take care of her." I said, "What are you going to do with her?" And he said, "I'll tell you what I'm going to do. She smokes a lot of cigarettes, and lots of people die by smoking in bed. I'll burn the house up. I kept taking a few drinks and I got in the car and left about six o'clock.

"'Q. With the understanding that he was going to take care of her by burning the house?

"'A. That's what he said he was going to do. I went to work. Instead of driving on Wilshire Boulevard I drove all the way to Sawtelle. I was drunk and was trying to get sober. Finally I arrived at work a quarter of nine. I had some breakfast, and about one o'clock or a little after he came down to the shop and said, "Everything's all right."

"'Mr. Killian: He said he got rid of her, did he not?

"'A. We went to Melody Lane and had dinner and talked about it on the way back.

"'Mr. Fitts: Back where?

"'A. To the shop.

"'Q. When you say "dinner" you mean lunch?

"'A. Yes, lunch. On the way back to the shop I said, "Did you burn the house up?" and he said no. I said, "What did you do?" He said, "I threw her in the bath tub and drowned her."

I said, "You God damned fool, that's the worst thing you could do." He said, "Why?" and I said, "That's the worst thing you could have done. I had a wife drown in a bath tub in Colorado Springs a little while ago." He didn't know that. If he had he wouldn't have done it. "Well," I said, "you really played hell but it's too late now."

"'Q. Because she was dead?

"'A. Yes.

"'Q. That is what he told you?

"'A. Yes. I said, "What did you do with her, leave her in the bath tub?" And he said, "No, I threw her in the fishpond." I said, "That won't stick. They will throw me in the jug when they find her. I'll be a good sport. You made a God damned fool of yourself and me both, but I'll take the rap. I won't talk. There ain't enough men in the district attorney's office to make me talk", and there wasn't if he had not told it. You never would have got me to talk. So of course I arranged for this couple to go home with me.

"'Q. Did they know anything about it?

"'A. No.

"'Q. They were perfectly innocent?

"'A. Absolutely. They don't know a thing about it.

"'Mr. Killian: At this time at the luncheon where you went to lunch together, did you give him some money?

"'A. I gave him all I had. I think I had $40 and I gave him $30 of it. I said, "Here's all the money I have. You get the hell out of here and stay away. I'll take the blame for it

and I won't talk. I was a God damned fool to get drunk and enter into a thing like this with you. If I had been in my right mind I wouldn't have done it. You have made a damned fool of us and I'll take the rap." I said, "I don't care about living anyway. Somebody is going to jail and it doesn't need to be both of us."

"'Mr. Davis: James, in your story this evening you told us that certain evidence had been destroyed because of blood on blankets. Tell Mr. Fitts about that, will you?

"'A. Oh, yes. While we were at lunch he said, "I cleaned up the house. I got water all over the floor of the bathroom. I had your sweater on. I mopped up with a few things, towels and things, and her foot had bled all over that bed."

"'Mr. Fitts: What?

"'A. He said her foot had bled all over the bed.

"'Q. Where the snake had bitten her?

"'A. Yes. He said, "I took your sweater and all the towels and the blankets and I straightened your house up good." I said, "What did you do with them?" He said, "I took them over to the house and burned them." I said, "Are you sure you burned them?" I said, "Are you sure?" And he said yes. I said, "Hope, if you took that stuff over to your house where that woman of yours can get hold of them she will break your neck." He said, "I didn't; I burned them." I said, "Did you burn the blankets too?" He said, "yes. She wouldn't talk anyway. I have got stuff on her that she couldn't talk." I said, "What have you got on

her?" and he said "It's her business", and I couldn't get it out of him. I don't know what he has on his woman.

"'Mr. Gray: Did he tell you that he had told her all about what happened?

"'A. He said he told her when he left Sunday night what had happened. He said they went to a party and while they was in the party he said the snakes were in the car. I knew what those snakes did, they rattled every few minutes. If you put one in the box it would get mad and rattle. I said, "You don't mean to tell me you took those snakes along in the car with that woman and she didn't know what they were?" And he said, "Yes." I kept arguing with him and he finally admitted to me that she knew about it.

"'Mr. Fitts: James, while you are making this statement let's clean it all up, if you will. Did you kill the girl back east in Colorado?

"'A. No, that was on the level, absolutely.

"'Q. And your nephew in San Francisco?

"'A. I was here and he was up there.

"'Q. Did you have anything to do with that?

"'A. How could I?

"'Q. I am asking you?

"'A. You know how he got killed?

"'Q. Automobile accident.

"'A. Could I have had anything to do with that. My sister is crazy, and she's always had it in her mind. She is really insane. She has had it in her mind that I killed my wife in Colorado and her son and Mary.

"'Q. In other words, she has just been wrong on two of them, is that right?

" 'A. Yes. The same thing is affecting her that it is affecting me."

" 'Q. You mean it is hereditary?

" 'A. I think it is. I am anxious to find out.

" 'Q. Let me ask you. You were at the point in your story where you were having lunch the day, Monday, of the killing of Mary, at which time you gave him $30. and told him to beat it and not to see you any more. He has been coming back to the shop frequently since then, hasn't he?

" 'A. Yes. It seems like when I buried Mary —I went to the beach and stayed a month and I didn't see him then.

" 'Q. This Miss Reed, you did see her at Hermosa Beach?

" 'A. Yes.

" 'Q. And you did offer her a thousand dollars to say she had seen Mary alive on Monday after you left for the shop?

" 'A. I was drunk when I was with her and I was practically a blank and I might have offered her a thousand.

" 'Q. The story that Dr. Densley has told about seeing your wife Mary around the house after six o'clock in the morning, he is clearly mistaken, isn't he?

" 'A. I don't see how he could. Of course I wasn't there after six and I don't think in her condition she could have got up and gone out in the yard, and I don't think Hope would have let her.

" 'Q. When you left for your shop Monday morning, and you left Hope and Mary there, you

left with the idea that she was to be murdered by Hope?

" 'A. That's what he said he was going to do.

" 'Q. That was your idea?

" 'A. Yes.

" 'Q. And when you came home and found her in the fish pond you had been told in the meantime by Hope that he had drowned her?

" 'A. Yes.

" 'Q. When you first discussed and arranged between yourself, that is, Hope and yourself, the murder of your wife Mary, it was for the purpose of collecting the $14,000 life insurance?

" 'A. It wasn't $14, it was $10,000.

" 'Q. $10,000, and you were to take half of it, $5,000, and Hope was to get half of it?

" 'A. That's right.

" 'Q. And it was in pursuance of that arrangement made in July sometime, that three different batches of rattlesnakes were purchased?

" 'A. That's right.

" 'Q. And it was further in pursuance of that agreement between you two that the third batch of what you call hot snakes were purchased by Hope and the story concocted and told to your wife that an abortion was to be performed?

" 'A. That's right.

" 'Q. And when the supposed abortion was being performed upon her it was not the idea of Hope or yourself at all to perform an abortion but to actually murder her for the purpose of the life insurance?

" 'A. That is what he said he was going to do.

"'Q. And that was your understanding?

"'A. That's what he told me.

"'Q. And in keeping with that agreement between you two, you gave him $20.00 one time to buy snakes, and $6.00 another time, and on the day of the murder, $100.00 and that $100.00 you paid him was for the preliminary part of the murder of your wife Mary?

"'A. That's right.

"'Q. And have you ever told anybody about this? Have you ever discussed this with Lois? Did you ever admit to Lois that you had killed your wife?

"'A. Never.

"'Q. Or to anybody else?

"'A. Never.

"'Q. Is there anyone who knows anything about the facts in this matter other than you two?

"'Q. Not a soul on earth unless he has let it out himself.

"'Q. Did you see the snake bite your wife?

"'A. No, he took care of that after I left.

"'Q. He told you that he had done so?

"'A. He told me that.

"'Q. And that was all right with you?

"'A. That was all right with me.

"'Q. This statement that you have made has been made freely and voluntarily?

"'A. Yes.

"'Q. No promise of immunity or hope of reward, or threats or duress held out against you?

"'A. I have told the true stuff.

"'Q. Freely, and it has been made by you?

"'A. Yes.

"'Mr. Killian: About the letter that was found on the table of the living room of your home. Will you tell Mr. Fitts about that?

"'A. She wrote it before I left home.

"'Q. She wrote it at your direction?

"'A. Yes.

"'Q. And you believe she wrote it because she was so intoxicated she wrote what you directed her to write?

"'A. Yes.

"'Mr. Fitts: That was the morning of the murder?

"'A. That's right.

"'Q. August 5th?

"'A. Yes.

"'Mr. Killian: Did Hope tell you that while he was in the house Sunday some people came?

"'A. Yes. When I got back to the house he was very nervous. He said, "This is a hell of a hot place up here. There have been at least a dozen people around here." I didn't know who had been around the house there except my niece and her husband and her father-in-law and mother-in-law, and they were the ones who left the note there. It seems like one or two other people came there looking for Smith but he had the shades all down and the house locked. I was out in my car so naturally they didn't think we was home.

"'Q. After the conversation with Hope at lunch on Monday, you took Pemberton and Viola

Lueck home with you because you knew you would find the body of Mary in the fish pond?

" 'A. That's right.

" 'Q. You were surprised that you had not heard during the day that somebody had found her, and you didn't want to find her alone?

" 'A. I didn't believe he had put her in the water as he said, but that he had left her in the house.

" 'Q. And that is why you brought them home with you?

" 'A. Yes.

" 'Q. And the story you have told us about Pemberton and Viola Lueck is true?

" 'A. Yes.

" 'Q. They knew nothing about the plans you and Hope had?

" 'A. That's right.

" 'Q. Concerning the money you gave Hope in addition to the amounts mentioned by Mr. Fitts, you have since given him various amounts of money when he came to your shop demanding money?

" 'A. Yes.

" 'Q. About how much?

" 'A. When I had that insurance settlement I bought my place and gave him $100.00.

" 'Q. That was when he returned from San Francisco?

" 'A. He said he had been there but I don't think he had ever been there. On several other occasions he came to the shop and demanded money. After I lost that insurance case he came to me there and told me his wife was in the

hospital dying and he had to have $75.00. I wouldn't give it to him. He begged me and begged me until I gave him $2.00. I said, "That's the last time you are going to get any money from me."

"'Q. Did you have a conversation with him regarding what you would do in case you were successful in securing insurance on the second policy?

"'A. I told him I would give him half of it.

"'Q. If you got $5.00 or $10,000.00 you would give him half of it?

"'A. Yes.

"'Q. Mr. Fitts: Hope says, Mr. James, that in the purchase of the second batch of rattlesnakes, he got those at Ocean Park and that you went down there with him to get that batch.

"'A. He is lying about that to you. He never let me know where he got any snakes. I did know he got the last ones from Joe in Pasadena.

"'Q. How did you know that?

"'A. He told me.

"'Q. Have you ever gone down to the Ocean Park place and studied the habits of the rattlesnakes?

"'A. The one time I was in there.

"'Q. But you didn't go with him?

"'A. No, I didn't go with him.

"'Q. At any time?

"'A. No.

"'Mr. Killion: During this last conversation with him about the money, did he threaten to take some action in case you didn't give him some money?

"'A. Yes. When I told him I had given him all the money I was going to give him, he said if I didn't give him $200.00 he said, "Give me $200 00 and we'll forget it all", and I said, "No, this is the last time I'm ever going to give you a dime of money."

"'Mr. Davis: When you reached home on the evening of the 5th with the Pembertons, and you didn't find your wife in the house, where did you expect to find her?

"'A. Where he said he had put her.

"'Q. Where did you expect to find her when you didn't find her in the house?

"'A. In the fish pond.

"'Q. And did you go to the fish pond and look for her?

"'Mr. Kilgon: At what time in the morning did Hope tell you that he had put the body in the fish pond?

"'A. He didn't tell me just what time. I believe he told me that he put her in there around 11 o'clock.

"'Q. Did he ever make any threats to you about squealing on you if you didn't give him some more money?

"'A. I told him "You don't need to think you are going to bleed me for money. We're all through. We played and lost and that's all. I'm never going to give you any more money." He said, "All right. I'm going to do some talking." I said, "You are just as guilty as I am. If you want to talk go ahead." And I never saw him any more until today.

"'Mr. Griffen: Going back to Sunday afternoon, on August 4th, I believe you told Mr. Fitts

that you went out riding in the afternoon in the car and you got back at 4 o'clock.

"'A. I think so. I didn't keep any particular time because I was drinking and I think I got back around 4 o'clock.

"'Mr. Fitts: Will you face Hope and tell him he killed your wife?

"'A. Yes.

"'2:50 A.M. CHUCK HOPE WAS BROUGHT INTO THE OFFICE.

"'Q. Mr. Hope, Mr. James has told us the story in detail about the rattlesnakes.

"'Mr. Hope: Yes, sir.

"'Q. That back in July, while his wife was at a convention, that you and he discussed the question of killing his wife with a rattlesnake.

"'A. No, sir.

"'Q. For the purpose of getting the insurance. That he paid you $20.00 on one occasion, $6.00 on one occasion, and $100.00 on another occasion?

"'A. That is correct.

"'Q. For the purpose of buying rattlesnakes?

"'A. Yes.

"'Q. And for the purpose of killing his wife?

"'A. No, sir.

"'Q. For the purpose of killing some woman?

"'A. Yes, sir.

"'Q. You tell him what you told me, Mr. James.

"'Mr. James: He knows it. You don't have to tell him.

"'Q. You tell him just what you told me a moment ago.

"'Mr. James: He knows that he went out and got three rattlesnakes and they were blind and wouldn't bite and he got two more and they wouldu't bite a damned thing, and he said he knew where he could get some that would bite and he went to Snake Joe's and got them. You had just as well come on, boy, and tell them what they know.

"'Mr. Hope: The first two batches were bought for some friend of his who was going to kill his wife. I bought the snakes and delivered them to him. The third batch he told me he was going to kill his own wife, and he took those snakes home.

"'Q. You knew when you were buying them, the third batch, that it was for the purpose of killing James' wife?

"'A. Yes, sir.

"'Q. And you bought them with that knowledge?

"'A. Yes, sir—no, sir, he told me that after he got the snakes in the car.

"'Q. You went on up to his house with him?

"'A. Not Saturday night, no, sir.

"'Q. Was he at the house Saturday night?

"'Mr. James: You bet he was.

"'Mr. Hope: I certainly wasn't. I was with my wife.

"'Q. Mr. James further says, Mr. Hope, that you represented to Mrs. James that you were a medical student and were to perform an abortion on her.

"'Mr. Hope: I never talked to Mrs. James.

"'Q. Did you know Mrs. James.

"'A. Only just one time that I had breakfast with them at their home and seeing her once at the shop and once on this other Sunday.

"'Q. Was she at home at the time you spent out there repairing chicken houses?

"'A. One day. His sister was there, and also his niece.

"'Mr. James: What day was that she was there?

"'A. That was on Sunday.

"'Mr. James: The Sunday she came back from Long Beach?

"'A. No, sir, before she went to Long Beach.

"'Mr. Griffen: Hope, you tell us this, how does it happen that you were introduced to Eva Murphy as a man with medical training?

"'A. Absolutely I don't know. He told that.

"'Q. No, he didn't. His sister Eva Murphy knows you as a medical man.

"'A. No. I have never represented myself as that.

"'Q. As a man who studied medicine?

"'A. Never.

"'Mr. Fitts: Mr. James further says that Sunday when he left the house at about 2 o'clock in the afternoon, that he left you with his wife. That when he returned about 4:00 Sunday afternoon that you told her you had had her bitten by this snake and she was in bed, and that she had bled quite freely. You told him that later, that her leg had bled freely.

"'Is that true, James?

"'Mr. James: That is exactly the truth.

"'Q. That Mr. James remained with her that night and you returned back to the James'

residence the next morning, around 5:30 or 6:00 in the morning.

" 'Mr. James: Right.

" 'Q. You told him you were going to finish the job that morning, that she was an inveterate cigarette smoker and had been drinking and that you were going to burn her body by burning the house down. Is that true?

" 'Mr. Hope: No, sir. I left the James residence at 2:30 Saturday afternoon and didn't return until one Monday morning.

" 'Q. You did return Monday morning?

" 'A. Yes, at one o'clock, not five.

" 'Mr. Plummer: Whose car did you drive?

" 'A. Mr. James' car.

" 'Q. Where did you drive it?

" 'A. I took my wife up and returned the snakes to Joe's.

" 'Mr. Fitts: James says that when he left that morning you were left alone with his wife.

" 'A. I was never alone with her.

" 'Q. That later, at one o'clock on Monday, August 5th, you met him at the shop and told him you had drowned her in the bath tub. Is that true?

" 'A. No, sir, I was lunching with my wife on Virgil and later went to the laundry between the hours of 12:30 and 1:30.

" 'Q. At any rate, you did accept $100.00 for the third batch of snakes?

" 'A. Yes, sir.

" 'Q. And that was given to you up at Mr. James' house, is that true?

" 'A. He paid me the hundred when I got the second batch of snakes.

"'Q. How much did he pay you on the third batch?

"'A. He just gave me the money to buy them, $10.00 to buy them.

"'Q. Later on he paid you $100.00 did he not?

"'A. After he received the insurance money.

"'Q. And you knew it was from the insurance money?

"'A. Yes.

"'Q. And you knew he collected the insurance money upon his murdered wife?

"'A. Yes, sir.

"'Q. And you received that money because of whatever participation and help you had given him in the murder of that wife?

"'A. Yes, I stated that before. On the Sunday, on the 4th, Mr. James never left the house to my knowledge because I had his car and had gone with it and did not return until one o'clock in the morning. The car was seen by numerous people.

"'Q. Mr. James, did you take those snakes back to Joe's on Sunday?

"'A. (Mr. James) No, he took them back.

"'Q. At what time?

"'A. He left there with them about four o'clock.

"'Mr. Plummer: Was he alone or was his wife with him?

"'A. He told me his wife was waiting on the corner in the car.

"'Mr. Fitts: Did he leave you alone with your wife then?

"'A. Yes.

" 'Q What was her condition then?

" 'A. She seemed to be—I thought she was intoxicated.

" 'Q. You say Mr. Hope did the actual killing?

" 'A. Absolutely.

" 'Q. And Mr. Hope, you say that Mr. James did the actual killing?

" 'Mr. Hope: Yes, sir.

" 'Q. At any rate, you say that you both agreed to do the job for the purpose of collecting the insurance, the life insurance of $10,000.00.

" 'A. No, sir, when he mentioned the insurance he said it was $5,000.00.' "

## B. WEIGHT OF THE EVIDENCE ON VOIR DIRE EXAMINATION

From the evidence hereinbefore related, taken on voir dire examination to determine whether the confessions were voluntarily made or were made by coercion, it would appear that, although the petitioner testified that he was beaten and threatened and suffered duress, the greater weight of the evidence was to the contrary.

With reference to the occurrences between April 19th and the 21st, 1936, when the petitioner claims to have been offered a lighter sentence, and to have been brutally beaten, it would appear to be sufficient to say that his story is expressly and unequivocally controverted not only by those who were alleged to have offered him some inducement and by those who were asserted to have beaten him, but by the wit-

nesses who booked him in the County Jail and examined his body for bruises and testified that none were there, although petitioner claimed to have been beaten until he was "black and blue from the waist up." Obviously, the jury were justified in believing that petitioner had not stated the truth, because if he had been so beaten on Sunday night, as he claimed, certainly there would have been some evidence thereof on Tuesday morning. Moreover, it will be remembered that the only complaint petitioner made to Mr. Fitts was that he had been "slapped by Jack Southard."

The slap by Jack Southard, which was admitted, was of course an unfortunate incident, but the circumstances show that it was not made with the thought of thereby inducing petitioner to confess, but was simply an outburst of temper upon the part of an officer who resented the foul thing said by petitioner concerning his dead wife. It was an unfortunate occurrence, but not one of such a character as would lead a person to confess to a crime of which he was not guilty. In short, there were submitted to the Court and to the jury two stories. One by the petitioner, uncorroborated, that he had been subjected to brutal treatment, and the other by the officers, corroborated by other individuals and' circumstances which showed that he had not been brutally treated. The jury were as much entitled to believe the story of the officers and to disbelieve that of the petitioner as they were to decide the other

way. They apparently believed the officers and not the petitioner. Therefore, we may assume that the facts as found by the jury on this controverted issue were that petitioner had not been promised anything, or threatened, or beaten, and that while he had been slapped, that incidental, unfortunate circumstance had nothing to do with his confession thirteen days later.

Moreover, it should be borne in mind that whatever treatment, whatever lack of sleep, whatever coercive methods may have been indulged in at the time of the arrest for incest and during the period from the morning of April 19th to the morning of April 21st, a period of forty-eight to fifty hours, these methods did not produce any confession of any crime on the part of the petitioner, for he made no confession at that time.

From April 21st to the morning of May 2d, a period of eleven days, he was not in the custody of the officers who are asserted to have used brutal methods toward him. During that time he was visited by his lawyer.

On the morning of May 2d, he was confronted by his accomplice, Hope, and accused of the crime. He testified that at that time he had a memory of the terrible beating which he had received on April 19th or 20th, and that he was afraid to deny the accusation. The jury had the right to believe that he had not received any such beating as he claimed, and that subsequently his assertion that he was

fearful of a repetition of that beating, or that he had a memory of that beating, was false. The jury had a right to believe that the reason he did not deny the accusation made in the presence of Hope was because it was true.

Petitioner testified that Southard, about 10.00 p.m. on May 2d, recalled to his mind the beating he had received in April, threatened that he would again beat him, and that petitioner thereupon agreed to say anything Southard wanted him to say to avoid a repetition of that beating.

It will be observed that the jury had a right to believe that this claim of petitioner as to a threat made by Southard was also false, because the jury may well have decided that the story of the previous beating was false, that consequently he could not fear the recurrence of a beating which he in fact had never suffered. Moreover, it will be noted, and this is significant, that while petitioner says that he agreed with Southard at 10 o'clock the night of May 2d to tell any story Southard wanted him to tell, no attempt was made at that time to get a confession and Southard did not propose a story for him to tell or attempt to get him to tell anything or make any confession. On the contrary, it appears unequivocally that some two hours later petitioner informed Gray and Killion, who had him in custody, that he would like to have something to eat, and that if they would take him out to get something to eat he

would tell them the story. It appears that he did eat a steak dinner; that he was provided with a cigar, and that thereafter, smoking the cigar, he recited in great detail his claim as to the manner in which the killing occurred. It will thus be observed that he chose his own hearers, he chose his own place, he chose his own time, and he chose the conditions under which he would tell what he claimed was the truth about the death of his wife. When asked by Killion if he wanted to tell the story before he ate, he said he preferred to eat first. When asked whether he wanted to return to the district attorney's office before he told the story, he said he preferred to tell it at the restaurant. He does not claim that Killion or Gray at any time threatened him or promised him anything, or used any force or violence or other coercive means upon him. He never made a confession to any person who, according to his own contention had used any force or violence or threats or coercive means upon him.

After the completion of his version of the murder as told to Killion and Gray at the restaurant, he went to the district attorney's office without objection and reiterated the story in greater detail in response to questions asked by the district attorney and others. This statement was taken by a stenographer in his presence, and no objection was made by him to telling the story at that time. When confronted by his accomplice, each of them

stuck to his version of the story as it had theretofore been recited by each of the participants in the crime.

The story as told by the petitioner was not the same story as that told by Hope. Therefore, his contention that all he was doing was repeating what the officers told him to say is subject to suspicion as to its truthfulness, because in fact he told an entirely different set of circumstances from those which the officers understood to be the facts as those facts had been related to them by the accomplice Hope. Hope threw the burden of the original planning for the crime upon James and claimed that James was the one who actually drowned his wife, whereas, James claimed Hope was the instigator of the crime, that Hope was the one who actually had the rattlesnake bite Mary James, and that Hope was the one who drowned her. Each of the participants in the crime admitted such complicity therein as to make him liable as a murderer of Mary James, but each sought to lay the burden of the greater criminal responsibility on the other. If the petitioner had merely related that which the officers wanted him to relate, as he claims he did, his tale would have been more consistent with that of Hope, and would have assumed the greater legal responsibility for the crime that was cast upon him by Hope's confession and would not have contradicted Hope in so many vital respects.

The jury under the evidence were justified in concluding that James and Hope had as accomplices murdered Mary James, and that each of them had taken such a part in the murder as to warrant his conviction of a willful, deliberate killing, perpetrated by means of torture and for money. The jury were justified in believing that James confessed only after and because Hope had confessed, and that in his bitterness toward Hope for having confessed he tried to throw the burden of the greater guilt upon Hope's shoulders in an effort to make Hope suffer the same consequences that he, James, would suffer for their joint crime.

In short, the greater weight of the evidence shows that petitioner did not confess by reason of any force or violence or threats used upon him, but that he admitted his complicity in the crime and sought by falsehood to make it appear that his accomplice was more culpable than was he, in order to "get even" with Hope, because Hope had "squealed," and that this was the real motivating cause of the confessions which he made. As related by Mr. Stewart, when the formal statement was taken petitioner sat quietly, unemotionally, smoked a cigar and answered the questions. As the verbatim statement shows, petitioner answered fully and freely, gave his own version of the affair, and did not accept suggestions made by his questioners as to what had happened, but told the matter in a different way in accordance with his own ideas. The

confession is replete with details as to matters which obviously could not have been in the minds of any of his questioners, and petitioner stated unequivocally that the reason he was confessing was because Hope had already confessed.

One other matter should be adverted to. After the confession had been admitted in evidence and all the officers had testified denying the alleged brutality, threats and coercive methods, petitioner when on the stand in his own defense advanced another story. He said that Fitts, the district attorney, had threatened him by saying that there was a mob outside clamoring for his life. (R. 734, 735.) This last-minute effort to bolster up a claim of coercive methods lacks credibility. It is in conflict with his earlier testimony, wherein petitioner stated that no threats of any kind were made in Mr. Fitts' room, or while he was in the district attorney's office before being taken to Mr. Fitts' room at the time of his arrest on April 19th. He admitted that no threats or offers were made on May 2d prior to his failure to deny the accusatory statement addressed to him by Deputy District Attorney Williams, and said specifically that prior to the giving of the formal statement in Mr. Fitts' office in the early morning of May 3d, neither Mr. Killian nor Mr. Fitts nor Mr. Gray laid a hand on him nor threatened him in any way or offered him anything.

The jury were justified, in view of this conflict, in totally disregarding the lurid afterthought of the petitioner which was wholly in conflict not only with his previous testimony but with everything that had been testified to by all the officers and others who had controverted him on his original story. No only did the petitioner confess under circumstances which the jury were justified in believing were not coercive, but confessed under circumstances which the jury were justified in holding made the confessions free and voluntary.

All the circumstances, as disclosed by the evidence herein, present an entirely different picture from that presented to this Honorable Court in the cases of *Wan* vs. *United States, supra; Brown* vs. *Mississippi, supra*, and *Chambers* vs. *Florida, supra*. In each of those cases the defendant was either a foreigner or an ignorant Negro and the record showed that acts of brutality and coercion, some of them of the most flagrant character, were committed upon the defendant or defendants with the avowed purpose of procuring a confession of guilt. There was no conflict as to the defendant or defendants having suffered such coercion or brutality or that such coercion and brutality were administered for the express purpose of procuring a confession, and in each of those cases the conviction rested solely or principally upon the confession thus procured. Such is not the record in the instant case.

### 3. Petitioner's Guilt Established by Evidence Independent of Confessions

The evidence shows overwhelmingly that not only were the confessions freely and voluntarily made but that the confessions were only a part of a mass of proof which established without the aid of the confessions petitioner's participation in the crime of which he was convicted. As has been hereinbefore pointed out, Hope in his testimony related facts and circumstances which incriminated petitioner in the death of the latter's wife. As was stated in the decision of the Supreme Court of the State of California affirming the judgment of conviction, *People* vs. *Lisenba*, 94 Pac. (2d) 569, at 572, with reference to the testimony of Hope—"His story was not materially shaken on cross examination." And, as pointed out in said decision, Hope's testimony was corroborated in many details by Mrs. Hope, Roland K. Kirby, Mike Allman, and Joe Houtenbrink.

Additional corroboration is found in the testimony of the witnesses Mrs. Ethel Smith and Charles Griffin. Mrs. Smith testified (R. 187, 188) to the effect that petitioner, after the death of his wife, brought to her house a trunk which he left with her and which she stored in the garage. Griffin testified (R. 189) to the effect that he examined the contents of the trunk and found pieces of rope which, according to the witness Hope (R. 81), resembled the rope which had been used

to bind Mary James at the time she was subjected to the bite of the rattlesnake.

It was also pointed out by said Supreme Court in its decision that there was also other corroboration of the accomplice Hope's testimony in the testimony of Lois Wright, petitioner's niece, who had seen Hope with petitioner at his barber shop and also at his home; in the testimony of Sam Grant, a barber in petitioner's shop, who placed Hope in the company of petitioner in the barber shop on many occasions in 1935; in the testimony of the autopsy surgeon, Dr. A. F. Wagner, and in the testimony of Dr. Gustave Boehme who examined the body of the victim and expressed opinions to the effect that the laceration and swelling of the toe and leg of the deceased were such as would be inflicted by the fang of a rattlesnake.

There was also the evidence furnished by the insurance agents who sold the policies of life insurance on the life of the victim, showing the somewhat unusual circumstances and large amount of insurance purchased by one in her station in life, and the motive that the petitioner had to cause her death.

The Supreme Court of the State of California also pointed out in its decision that the witness E. L. Taggart, an automobile man, testified that early in 1935 petitioner spoke of expecting to get a large sum of money from an estate; that the witness Madge Reed testified to circumstances tending to

establish a motive and an effort on petitioner's part to establish an alibi "in the event his foul deed came to light." All of these circumstances tended to corroborate the defendant Hope and to connect petitioner with the commission of the crime.

In addition to the foregoing, there is the evidence of the so-called Colorado affair which established that, as in this brief elsewhere pointed out, the petitioner had similarly insured and killed another wife a few years before. This evidence tended to corroborate Hope's testimony that petitioner was the instigator and perpetrator of the murder of Mary James and tended to show the motive for the crime, and tended to show that the death of Mary James resulted from a carefully laid plan to kill her for insurance money, as claimed by Hope, and not from an accident or an attempt upon the part of Hope to produce an abortion, as claimed by petitioner.

In his own defense, under cross-examination, petitioner made many conflicting statements. The Supreme Court of the State of California in its decision, on page 585 of 94 Pac. (2d), pointed out some of those inconsistencies. We have hereinbefore mentioned them, as for instance, the petitioner on voir dire testified that he had not been subject to any threats, or force, or violence, or promises by the district attorney, and yet later in his defense he testified that he had been threatened and frightened by talk of mob violence,—the latter statement being obviously something that was conjured by him for

the purpose of trying to bring his case within some of those which have been decided by this Honorable Court.

The foregoing facts and circumstances are called to the attention of this Honorable Court for the purpose of showing that, irrespective of the confessions and without them, there was adequate evidence establishing not only petitioner's participation in the murder of his wife, but that he planned and cold-bloodedly carried it out in such manner as to attempt to make her death appear to have been caused by accidental means from a cut or insect bite. The evidence, independent of his confessions, goes so far as to establish that petitioner, when he deemed the means thus employed by him too slow in causing death, resorted to a more certain and speedy method by drowning the deceased and disposing of her body in a manner which would still indicate that the cause of death was accidental.

We do not have here, as in the *Wan*, *Brown* and *Chambers* cases, *supra*, a situation where the only evidence of the guilt of the accused is his own confession wrung from him by torture. We do not have a case where there would have been no justification for the finding of guilty except for use of a confession, but we have a case in which all of the evidence so enmeshed the petitioner in the toils of his own making that his guilt appeared inescapable. Before he confessed he was confronted by some of the witnesses against him. (R. 198, 445, 446.) As shown

by the terms of his own confession, he realized the strength and weight of the proof of his guilt, and we submit that the conclusion is almost inevitable that the only reason he confessed was because he believed that by so doing he could "get even" with his accomplice whose weakness in "squealing" had brought the crime upon petitioner's own head.

We particularly direct the Court's attention to these circumstances because it appears to respondent, as heretofore pointed out, that all the decisions of this Honorable Court, rejecting the use of confessions obtained by compulsion, point out the fact that the confession was the sole or principal evidence against the defendant. It further appears to respondent, in that particular, that this case is clearly distinguishable from those cases. The instant case does not present a situation where a defendant whose guilt was not otherwise established was convicted solely by evidence of a confession wrung from him while he was dominated and his mind subjugated by the officers of the law and others. To the contrary, it presents a situation where the guilt of petitioner was established by evidence independent of his confessions and where petitioner seeks to escape the just punishment for his brutal crime by falsely claiming that the confessions, which were part of the proof against him, were obtained by brutal and coercive methods.

We respectfully submit that the facts here do not present such a case as will appeal to this Honor-

able Court as coming within the prohibition of the Fourteenth Amendment.

The petitioner was arrested, lodged in jail, and later confronted by his accuser. He confessed at a time and place and to persons of his own choosing, and without compulsion. No picture is here presented of a tortured victim. No confession was extracted by means comparable to those employed in the Middle Ages, or by means condemned by this Honorable Court or by any other court within our knowledge.

Before petitioner was arraigned on the incest charge and the murder charge, he had had the advice of counsel. During the time he was in jail, before he confessed, he had had the advice of counsel. He had the advice, cooperation and assistance of three skilled lawyers during his trial. Every point which could be suggested in his defense was suggested. Every bit of evidence which could be adduced on his behalf was adduced. The trial lasted for weeks. The arguments consumed days. There was no rush to get to trial. No public clamor for petitioner's life. His trial was public. All of the safeguards of the Constitution of the United States which can be placed about a person accused of crime were placed about him. His case was considered by a jury of his peers. It was again passed upon by the trial judge on motion for new trial. It was twice considered by the Supreme Court of the State of California. The contrast between this

case and those cited by the petitioner is so great that it would appear scarcely necessary to point out the differences in the situations. In most of those cases race prejudice or mob spirit was involved, a hasty bringing of the accused to trial, no opportunity for preparation, and the trial was short and followed by an immediate verdict—all in a hectic atmosphere of racial prejudice and mob spirit.

None of those factors is involved in this case. We therefore earnestly submit that the instant case does not come within the principles stated in the *Wan*, *Brown* and *Chambers* cases, *supra*, or in any other case decided by this Court, but submit that the evidence shows most satisfactorily that petitioner had a fair and impartial trial; that his confessions were the result of his own voluntary acts, not brought about by anything except his own desire to tell of his criminality in a light most favorable to himself. As was pointed out by the Supreme Court of California in its decision, 94 Pac. (2d) 569, 579, in the following language:

> "A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give

but passing mention to the authorities relied on by the defendant."

It thus appears that the due process clause of the Fourteenth Amendment of the Constitution of the United States was not infringed by admitting in evidence the confessions made by petitioner.

## II. THE FOURTEENTH AMENDMENT WAS NOT INFRINGED BY THE PRODUCTION IN COURT, THE RECEIPT IN EVIDENCE, AND EXHIBITING TO THE JURY CERTAIN RATTLESNAKES

Petitioner makes the point that the bringing of two live rattlesnakes into the courtroom and exhibiting them to the jury was so inflammatory and frightening in its nature as to make of the trial a mock and sham and violate the fundamental guarantee of due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

Respondent's position is that the bringing of the particular live rattlesnakes into the courtroom for inspection by the jury as exhibits in the case was as a matter of law proper and as a matter of practical trial procedure an almost necessary thing to do. The snakes were brought into the courtroom in a quiet and orderly manner, were kept there only for the length of time necessary for their identification as exhibits in the case and for inspection by the jury and thereafter and as soon as practical they were quietly removed from the courtroom. This was done

without any unnecessary histrionics and under conditions which enabled the jury to observe the rattlesnakes for their evidentiary value. The jury were not inflamed or frightened. Before being exhibited to the jury the rattlesnakes had been positively identified as being the identical snakes which were purchased by Hope at petitioner's direction for the purpose of killing Mary James. One of them had actually been used in an attempt to murder her, and its bite was a contributing cause in her death.

In order that the competency and relevancy of the rattlesnakes as evidence may be apparent, and the circumstances and incidents of bringing them into court may be shown to have been unemotional, quiet and orderly, we purpose first to review the authorities dealing with the subject of the admissibility of "real" or "demonstrative" evidence in a case analogous to the instant case, and secondly, to review the facts showing the relevancy and materiality of these particular rattlesnakes as evidence, and all of the circumstances under which they were produced.

## 1. The Law With Reference to "Real" or "Demonstrative" Evidence

The Code of Civil Procedure of the State of California provides as follows:

> "Section 1954. MATERIAL OBJECTS. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such

object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court."

Pursuant to this code section, it has been held in California to be permissible to introduce in evidence numerous physical objects, including the instruments with which the crime was committed, weapons and bullets, wearing apparel of the victim of the crime, clubs, knives, and similar objects.

8 Cal. Jur. pp. 140-145.

The California rule is in consonance with the general rule throughout the United States. In Jones Commentaries on Evidence, Second Edition, Volume 3, page 2518, the rule is stated as follows:

"At this date there is no longer serious doubt either as to the admissibility or importance of what is called 'real' evidence. We have already defined the term, which is sometimes valid to 'immediate' or 'demonstrative' evidence, or 'autoptic preference'.

"For obvious reasons there is no class of evidence so convincing and satisfactory to a court or a jury as that which is addressed directly to the senses of such court and jury."

At page 2520 the same author states:

"The right to use real evidence scarcely needs authority to support it. It is true that evidence for the most part is by the oral testimony of witnesses and by documents, but when the thing testified to can be seen by the jury, subject always to the control of the presiding judge,

consistency demands that if the ends of justice can be furthered by its production, it should be produced."

Wigmore, in the Second Edition of his work on Evidence, Paragraph 1157, deals with the subject in part as follows:

"The autoptic preference to the jury of the weapons or tools of a crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on grounds of Undue Prejudice."

After a discussion of some of the cases dealing with the subject, the author continues:

"The objection thus indicated seems to be twofold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence.

"The objection in its first phase may be at least partly overcome by requiring the object to be properly authenticated, before or after production; and this requirement is constantly enforced by the Courts (post, Sec. 2130).

"The objection in its second phase cannot be entirely overcome, even by express instructions from the Court; but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. No doubt such

an effect may occasionally and in an extreme case be produced; and no doubt the trial Court has a discretion to prevent the abuse of the process. But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the Courts."

In a footnote to the foregoing, Professor Wigmore has appended a citation to numerous cases from England and most of the states of the United States dealing with the subject matter. An examination of this footnote, to which reference is hereby made, will show that not only were the clothing worn by numerous victims showing bullet holes and victims' blood received in numerous cases but also that weapons such as guns, pistols, cartridges, hatchet, knife, razor, and other weapons exhibited to juries, and that also photographs of the wounds of the victim and of the victim's body, showing the character and position of wounds, were admitted in evidence; also, that such matters as the skull of the deceased victim, the severed head of the deceased victim preserved in alcohol, the neck of the mutilated deceased person said to have been strangled, were among those real objects which were received in evidence.

Innumerable cases could be cited showing various applications of the rule to numerous cases. However, the foregoing indicates the respondent's position with reference to the legal right to pro-

duce any "real" evidence which is relevant to the issues involved in the case. The California case of *People* vs. *Green*, 13 Cal. (2d) 37, 42, 43, is a typical case in point.

In order that the relevancy of the two rattlesnakes which were produced as evidence in the instant case may appear, we recite the facts in relation thereto as shown by the record.

## 2. The Rattlesnakes Were Identified as Instruments Used in Accomplishing the Murder

The witness Hope testified that petitioner told him to get "some fighters" (R. 70); that Hope thereupon went to "Snake Joe" and got two snakes, which he put in two boxes, one in a glass box and one in a small box with a screen door on top. He put the boxes containing the snakes in James' car and then met James, who took the car, letting Hope out of the car at Beverly and Vermont streets after telling Hope that he (James) was the one who was going to use the snakes, that his wife had five thousand dollars worth of insurance which he was going to collect (R. 70-72); that on the following day at about 12.30 or 1.00 o'clock p.m., Hope arrived at the residence of James (R. 72-73), at which time the snakes were in the boxes in the garage. (R. 73.) After Hope had been in the garage about ten minutes James stated to him:

> "'You are in this thing just as deep as I am. You have bought these snakes all over the country. I have had you out here at the house.

> Different people have seen you.' . . . 'Now bring that box in the house.'"

Hope then walked ahead with the glass-topped box with the snake in it. James followed him. They entered the house. (R. 73-74.) James held the screen door open. Hope went through the back door into the kitchen. James passed Hope and, as Hope testified:

> "Mrs James was lying on the breakfast table with a piece of adhesive tape over her eyes and over her mouth. He went ahead of me, raised her foot up so I could get by, pointed to where I was to set the box on the seat of the breakfast table, which I did. In setting that down the top flew back. He put her foot in the box. After he closed the box I took the box back to the garage." (R. 74-75.)

"The snake was in the box, and was alive." Mrs. James was in her nightgown. Her legs were bare and her left leg was put into the box. (R. 75.)

Hope further testified that later the same day he took James' car, took the boxes with the snakes and returned the snakes to the man from whom he had bought them (R. 76); that thereafter he threw the boxes away; that he returned to James' house at about 1:30 o'clock the following morning (R. 76-77); that at that time James was in the garage; that after having a couple of drinks James said to Hope: "Those snakes are no good either. My wife is not even sick." Hope said: "Why don't you take her to the hospital?" James said: "No.

they will string us both higher than a kite." James then jumped up and said: "I am going in and drown her." (R. 78.) At 4.00 o'clock James came out of the house and said: "That is that." At about 6.30 or 7.00 o'clock James came out to the garage and said:

> "She has been dead since 4:00 o'clock. The house is all cleaned up and you will have to go in and help me carry it out." (R. 78.)

Hope then went into the house, saw the dead body of Mrs. James lying on the floor in the hallway near the bathroom door and assisted James in carrying her out to a point alongside the fish pond. He refused to assist James in putting her into the fish pond and went back to the car, where he was later joined by James. (R. 78, 79.)

The witness Houtenbrink (commonly known as "Snake Joe"), testified that on August 3, 1935, he sold two diamond-back or Crotalus Atrox rattlesnakes to Hope for $3. (R. 201-203), which Hope put into a "glass bottom box" and took away with him (R. 203); that on the next day, August 4th between 2.00 and 3.00 o'clock in the afternoon, he rebought the same snakes from Hope and paid him $1.50 therefor. (R. 204.) He further testified that he still had those snakes, the identical snakes which he had sold to and rebought from Hope, and that they were in the court room. (R. 204-206.) He then, accompanied by counsel for defendant, stepped over and examined the contents of a box

covered with burlap cloth which had just been brought into the court room. He stated that he recognized the contents as being two rattlesnakes, which were the same snakes which he had sold to Mr. Hope and which Hope had returned to him. (R. 205-206.)

Previously Dr. Boehme, a witness called for the people, had testified to his examination of the exhumed body of Mary James, and had there discovered that the base of the great toe on the left foot had a laceration wound approximately a quarter of an inch in length; that the left leg was marked, discolored and swollen from the knee to the hip, almost mahogany in color; that he had formed an opinion that the wound, discoloration and swelling were of such a character as probably to have resulted from the woman's toe having been bitten by some venomous creature, probably a snake; that all other findings on the leg were compatible with that opinion, and that the wound was of such character as could be caused by snake fangs striking at an angle. (R. 109-111.)

Dr. Wagner, the autopsy surgeon, testified that upon his examination of the body of Mary James he found, among other things, a laceration on the plantar surface of the left great toe and the left foot considerably swollen; the lungs containing considerable amount of water; no disease of any of the vital organs; the uterus showed a normal pregnancy of about six weeks; superficial bruises of varying

extent in various parts of the body; chemical analysis of the stomach, liver and kidneys showed no poison; that in his opinion the cause of death was drowning and an acute cellulitis of the leg. (R. 93-94.) He further testified that cellulitis might be caused by bacterial infection or animal poison; that the venom of insects, snakes, etc., caused acute cellulitis (R. 95-97); that the type of cellulitis found in the body of Mary James could have been caused by the bite of a rattlesnake (R. 97), and that he reached the conclusion from the punctured wound that it could have been made by the bite of a rattlesnake. (R. 99.)

### 3. The Rattlesnakes Were Relevant to the Issues and Admissible as Part of the Res Gestae

It will thus be seen that before exhibiting the snakes to the jury, it had been established that the victim, Mary James, bore upon her body a wound and a cellulitis of a type that could be produced by the bite of a rattlesnake. It had been testified positively by the petitioner's accomplice in the murder of Mary James, that the snakes had been purchased for the purpose of killing her, and that her bare foot had been thrust into a box containing one of these snakes. It had been established by the testimony of "Snake Joe" that two live rattlesnakes had been put into the possession of the witness Hope on the 3d of August and had been returned by him on the 4th of August. The snake which had been in the

box when Mary James' bare foot was thrust into the box had been identified by Hope as one of the two which he bought from "Snake Joe" and later returned to him, and "Snake Joe" unequivocally identified the snakes in the box in the court room, (which had not yet been exhibited to the jury), as the identical snakes which had been delivered to Hope and returned by Hope. Under the evidence both of these snakes had been purchased to be used in the killing of Mary James, and one of them had actually been used in attempting to kill her. Consequently, as to the matter of the identification of the snakes and their relevancy, it would appear clear that they were adequately and unequivocably identified as the instrument used in the course of an effort to kill Mary James, and consequently under the authorities herein cited, were relevant as evidence.

We can not refrain from stating an analogous case. Let us suppose that a defendant is accused of killing his victim and that it is shown by the evidence that he first struck the victim over the head with a hammer and that the victim fell wounded. Thereafter, the victim not having died, it is shown that the defendant shot him in the head with a revolver, the shooting producing instant death. The autopsy surgeon gives the cause of death as a gunshot wound with fracture of the skull caused by a violent blow with a hard object as a contributory cause of death, and states in his opinion such a blow as that which

caused the fracture could have been produced by a hammer. Can it be doubted that under such circumstances the hammer, identified as having been found by the side of the victim, bearing human blood, would be admissible in evidence as relevant to the issue as to the manner in which death was effected?

Under the laws of the State of California the jury in a homicide case have several duties to perform:

First: To determine who committed the homicide.

Second: To determine whether the homicide was manslaughter or murder.

Third: To determine whether, if murder, was murder of the first or second degree. In determining this latter question the jury have a right to consider whether the murder was premeditated, whether it was the product of an abandoned and malignant heart on the part of the defendant, or whether it was effected by means of poison or torture; because if it was premeditated or it did proceed from an abandoned and malignant heart, or was effected by means of poison or torture, it is murder of the first and not of the second degree.

Fourth: Having determined it to be murder of the first degree, the jury have a right and a duty to determine whether the murderer shall suffer life imprisonment or death as punishment for his crime. This matter is left entirely to the discretion of the jury, and is a matter to be determined by them in view of all of the circumstances connected with the

murder. Obviously, a murder produced by cold-blooded torture by a man who tries one means, and upon its failure, then resorts to another in his determination to kill, would be treated as to the penalty in a different way from a murder less atrocious in the manner of its perpetration. It certainly can not be said that nothing is proved by the production in court of an instrument used in, or acquired for, the perpetration of a murder. The type of instrument may well indicate the character of the crime intended. Certainly, the fact that a poisonous rattlesnake was used in an effort to perpetrate this particular murder shows a heartlessness, cold-bloodedness and willingness to torture that is almost inconceivable. These are circumstances which should have considerable weight with the jury in determining the several questions which it is their duty to determine in reference to the culpability and punishment of one accused of murder.

It certainly may well be doubted whether the mere statement by Joe Houtenbrink that he still had the same snakes which had been sold to and returned by Hope would have been believed by the jury; whereas, when the actual snakes were produced in court, with Houtenbrink's identification thereof, the jurors were unquestionably more likely to believe his testimony, and that of Hope, than they would have been if the snakes had not been produced. It is axiomatic that where the prosecution shows the crime to have been committed by

some instrument or other physical object and fails to produce the same at the trial for the inspection of the court and jury, the defense may argue vehemently that the evidence of the prosecution falls by its own weight because if such an instrument or object was used, the prosecution would have produced it.

Furthermore, we believe that a trial prosecutor who was able to but did not produce the rattlesnakes in question in the instant case, would be open to severe criticism for lack of fairness to the defense.

### 4. No Prejudice Was Suffered by Petitioner from the Manner of Producing the Snakes

We come now to the manner of the bringing of the rattlesnakes into the courtroom, and the alleged circumstances of an inflammatory and frightening nature. The first thing that transpired with reference to the rattlesnakes being brought into the courtroom was a statement made outside the presence of the jury by Mr. Clarke, one of petitioner's counsel, who stated that he understood the district attorney intended to bring the snakes into the courtroom, and that he did not consider them admissible in evidence; he considered the bringing of the snakes into the courtroom would be highly prejudicial to the case, and there would be no other purpose than just to excite the passions of the jury. (R. 200-201.) The Court indicated that it

would treat this statement as an objection and would deal with the matter when it arose.

The next thing that appears in the record is that after the witness Joe Houtenbrink had stated that he still had the identical snakes involved in the case, he was asked:

> "Q. Are they in here in the court room?
>
> "A. If I can see them I will tell you if they are here, yes sir." (R. 204.)

Whereupon the following occurred: (R. 204-205.)

> "Mr. Williams: Will you produce that box?
>
> "Mr. Clark: If the Court please, I object to the witness leaving the stand for the purpose of looking at the box that has been brought into the courtroom, or for any other purpose. I object to any snakes being exhibited or introduced into this case. I think this is an appropriate time for me to ask your Honor either by statement of your Honor or some appropriate means to make it appear in the record that two men have just entered the courtroom carrying a box covered with a burlap cloth, and upon their coming down the aisle, the people who were in the courtroom, filling the courtroom, manifested excitement, that several of them rose from their seats, that the attention of spectators and the jury were directed away from the testimony of the witness that at the time I am speaking there is upon the faces of the audience an appearance of anxiety and consternation not heretofore exhibited during this trial.

"The Court: The Court has no knowledge that there was any such manifestation on the part of the audience. The Court is unable to state whether the attention of any person was diverted or not, nor is there anything to indicate the apprehension that your statement implies; at least, it has not been seen by the Court.

"Mr. Clark: In other words your Honor has no knowledge that the statement I have made is correct?

"The Court: No. That may be your frank, honest opinion as to the facts, however, the Court has not seen any such situation.

Mr. Clark: I will try to find appropriate means of putting those facts in evidence. I think that they are facts and that my statement is appropriately made at this time.

"The Court: So far as the physical facts of the two men having taken the box in from the courtroom door and passed up the aisle between the two groups of spectators, through the gate into the inner part of the courtroom and deposited the box by the side of the bench, the record may show that that did occur."

The objection above mentioned was overruled and the witness accompanied by Mr. Clark, the attorney for the petitioner, stepped over and examined the contents of the box, after which the witness identified the snakes as being the identical ones described in his testimony. (R. 206.) Thereafter the snakes were offered in evidence but were marked for identification only. (R. 206.) Thereafter the witness Houtenbrink was subjected to extensive cross-exami-

nation (R. 206-212), at the conclusion of which the snakes were again offered in evidence and received. (R. 212.) Whereupon the box was placed in a position where the members of the jury could and did observe the snakes. (R. 212-213.) After the jurors had observed the snakes, by stipulation the snakes were removed from the courtroom. (R. 213.)

It will be noted from the foregoing that, although counsel for the defendant claimed that there had been some excitement manifested in the courtroom at the time the burlap covered box containing the snakes was brought into the courtroom, the Court expressly stated that he had no knowledge of any such manifestation, or that the attention of any person was diverted. The Court stated as a matter to be shown by the record that two men had brought the box in through the courtroom door, passed down the aisle between the two groups of spectators toward the gate into the inner part of the courtroom and deposited the box by the side of the bench.

This is all that happened. Thereafter the jurors were permitted at an appropriate time to inspect the snakes and the snakes were removed from the courtroom.

There is absolutely no evidence to the effect that any person, either on the jury or off the jury, was in the slightest degree frightened or agitated either by the presence of the snakes or the manner of bringing them into the courtroom. There isn't anything inherently terrifying in the

sight of snakes in a glass enclosed box. It is a matter of common knowledge that men, women and children pay five or ten cents for the privilege of seeing snakes in snake pits and side-shows. It is a matter of common knowledge that caged snakes are on exhibition in zoos attached to public parks in practically every city in the United States and men, women and children congregate before these cages, observe rattlesnakes in their cages and, unless prevented by attendants, try to tease the snakes into rattling and striking. All these things are matters of common knowledge. It is true that almost everyone is afraid of a loose rattlesnake in the mountains or on the desert because of the fear of being bitten, but that fear does not extend to a properly caged rattlesnake where there is no possibility or danger that anyone may be bitten by it. In fact, in our own judgment the sight of a caged live rattlesnake is much less horrible, much less apt to cause nausea or inflame passions than the sight of a hammer or axe with blood of the victim thereon, or the sight of a bullet which has pierced the victim's heart and been extracted by the surgeon, or the sight of bloodstained clothing of the victim, or of strands of the victim's hair, or bones, or morgue pictures of the victim showing the effect of wounds, or cuts or blows upon the body; all of which are customarily introduced into evidence without particular comment.

The fact is that the object, whether it be a blood stained hammer, a bullet, a bone, pieces of hair, or a rattlesnake, is not of itself a thing to inflame anyone's passions, or which affects his calm judgment. The thing which arouses emotion is the act of murder. When that act is accomplished by means of torture, or cruelty of exaggerated or vicious character the recital of the details of such killing will produce horror or arouse emotion. If the particular defendant is shown to have been the perpetrator of the murder, its cruel or brutal character should and will count against him. It is the thing which the defendant did which may impassion the jury, but certainly not the mere sight of some physical object from which the jury may get perhaps a clear idea of exactly what he did do.

It is, of course, possible that rattlesnakes, or any other object connected with the commission of an atrocious murder, might be brought into court and handled in such a sensational or spectacular way as to produce an improper effect. Such, however, was not the manner in which the rattlesnakes were brought into court in this case. As the record shows, the whole proceeding was calm and dispassioned. The snakes, after having been identified, were withheld from the sight of the jury until petitioner had had an opportunity to cross examine the witness, Joe Houtenbrink, by whom they were produced, so that in case his identification was deemed insufficient after cross exam-

ination the snakes would not have been shown to the jury. All precautions were taken to make the matter as little spectacular as was possible. We apprehend that no serious view can be taken to the effect that such conduct deprived petitioner of due process within the meaning of the Fourteenth Amendment of the Constitution of the United States.

### 5. Petitioner Waived Any Claim of Prejudice by Again Producing the Snakes and Exhibiting Them to the Jury

It may be stated emphatically that all of the furor attempted to be made by petitioner about these rattlesnakes is nothing more or less than an attempt on the part of lawyers to make something out of nothing. We positively state that neither the lawyers, nor the petitioner, nor the jurors were in the slightest bit agitated by the snakes being brought into the courtroom. The petitioner did not feel that the presence of the snakes in the courtroom was injuring him in any way, or inflaming the jury against him. We make this positive statement for the reason that, after the snakes had been removed from the court room, where they had remained for a few minutes and only for the purpose of identification and inspection, they were at the request of petitioner as part of his defense returned to the court room and kept before the jury as exhibits for a

considerable length of time while counsel for the defense interrogated their own witnesses as to the life and feeding habits of rattlesnakes and their methods of striking and killing. (R. 691-697.)

Surely, if petitioner had had the slightest idea that the jury was being inflamed against him by the sight of the snakes, he would not have permitted the exhibition which his counsel voluntarily made of them after their removal by the district attorney.

The Supreme Court of the State of California carefully considered this point and finally reached the conclusion which is expressed in the following language quoted from the opinion (R. 956.):

> ". . . In view of such identification of the snakes and their employment in the plan to bring about the death of deceased, we perceive no error in the trial court's ruling permitting the production of the snakes for the inspection of the jury. It is not uncommon upon a murder trial to offer in evidence as part of the res gestae the medium employed to bring about the violent or untimely death of the victim. In *People* v. *Bannon*, 59 Cal. App. 50, 56, it is stated that 'As a general rule physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.' (See, also, *People* v. *Peete*, 54 Cal. App. 333, 348, and 8 Cal. Jur. 143, Sec. 228.) Moreover, the production of the identical snakes

tended to corroborate the testimony of prosecution witnesses and to otherwise support the case of the People. It might also be mentioned that if the production of the snakes in court caused the extreme state of excitation urged by the defense, it is difficult to appreciate why defense counsel at a later time in the trial and during the development of the case by the defense, again produced the snakes and thus risked a repetition of the situation of which complaint is here made."

### 6. The Affidavits on Motion for New Trial

What has heretofore been said with reference to the matter of the rattlesnakes is from the record of the trial itself. On motion for new trial, however, the defendant filed two affidavits in which reference was made to the incident of the bringing of the rattlesnakes into the courtroom. The affidavit of R. E. Parsons, one of the counsel for the petitioner, sets forth the circumstances substantially as stated by the court at the time of the incident with the exception of the fact that affiant Parsons claimed that he could hear the rattle of the snakes. (R. 822-823.) The affidavit of William J. Clark, another of the attorneys for the petitioner, seeks to dramatize and overemphasize the incident. He says:

"The snakes were alive and sounding their rattles. A wave of terror—I can find no other language more accurate—swept through the court room. Spectators rose from their seats,

Some nearest the aisle shrank away. Many uttered exclamations of fright." (R. 828.)

He then quotes certain hearsay excerpts from various newspaper articles containing much intemperate language which sought for the benefit of their readers to dramatize the incident. (R. 828-830.)

These affidavits on behalf of the petitioner were met by the affidavit of Eugene D. Williams, a deputy district attorney who participated in the trial on behalf of the people, which affidavit recited the facts with reference to the identification of the snakes, and stated that while said affiant was in the courtroom at the time the snakes were brought in, there was not to his knowledge any wave of terror or exclamations of fright, or any extraordinary or unusual commotion among the spectators, and none among the jurors. This affidavit also points out that the whole matter of bringing the snakes into court was done in an unostentatious way, and points out that the snakes were brought into court a second time at the instance of the petitioner himself. (R. 1116-1117.)

The trial court had these affidavits before it at the time of the motion for new trial. There was a conflict in the evidence as shown by the affidavits with reference to the degree and character of the effect produced in the courtroom by the bringing in of the snakes. The trial judge also had his own knowledge and recollection of what had actually

happened. He decided that no prejudice had resulted to the defendant from either the fact of the bringing of the rattlesnakes into the courtroom or the manner in which they were brought. It would appear under recognized rules that his decision in that matter as to which he had firsthand personal knowledge, should be conclusive. At least it can undoubtedly be stated that there being a conflict not only in the facts themselves but in the conclusions to be drawn from the facts with reference to the effect, if any, produced upon the jury by the rattlesnakes, that the court was not guilty of any abuse of discretion in determining, as it did, that no real prejudice had been suffered by the petitioner of such a character as to warrant the granting of a new trial.

For the foregoing reasons it is respectfully submitted that the bringing of the rattlesnakes into the courtroom, in view of their obvious relevancy as evidence, in view of the manner in which they were produced, in view of the fact that the petitioner himself had them again brought into the courtroom for the purpose of again exhibiting them to the jury, could not be said to have created such an inflammatory condition as to make the trial a "mock and sham" or to violate the requirements of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

## III. PETITIONER'S RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT, WERE NOT VIOLATED BY THE INTRODUCTION IN EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF A FORMER WIFE OF PETITIONER

### 1. Evidence Relative to the Death of Winona James in Colorado

For a number of years prior to 1932, C. A. Pries, an agent for the Prudential Life Insurance Company, frequently visited the barbershop of James, located in downtown Los Angeles, for the purpose of interesting James in life insurance, who at the time had a policy in some insurance company. The barbershop was in the center of Pries' territory. During this period of time James had suggested to Pries names of persons who might possibly be interested in insurance. About April 25, 1932, James told Pries that he might soon have a prospect for him. (R. 398, 399.)

On May 20, 1932, James introduced Pries to Winona Wallace (R. 401, 402), who had been a bookkeeper for the Howard Automobile Company. (R. 759.) Two days prior to this, James had told Pries to come to his home at 7 o'clock in the evening of May 20th, and he would have a prospect for him. (R. 401.) On the evening of May 20th, James, after introducing Pries to Winona Wallace, gave Pries an application for a $5,000 policy on his own life and suggested that Miss Wallace take a

like amount of insurance on her life, whereupon Pries received an application from her for a $5,000 policy. (R. 402.) James told Pries that he and Winona were to be married within a month or two and inquired of Pries if he could be named the beneficiary in her policy. Pries informed James that he had no insurable interest but that after marriage, if she consented, the beneficiary could be changed. (R. 403.) When the policies were issued, the policy of Winona Wallace carried double indemnity. (Exhibit 62.) James carried the $5,000 policy on his own life for only three months. (R. 1106.)

Sometime between the issuance of the $5,000 policy, above mentioned, to Winona Wallace and July 25, 1932, when an affidavit for change of beneficiary was sworn to, James and Winona became husband and wife. (Exhibits 62 and 71.) On August 2, 1932, two additional policies in the amount of $1,500 each were written by The Policy Holders Life Insurance Association on the life of Winona James, nee Winona Wallace. (Exhibits 66 to 70, inclusive.) She had carried a $1,000 policy of life insurance in the Kansas City Life Insurance Company for about eight years and her sister was named beneficiary therein. (Exhibit 71.) They borrowed $150 on this policy (R. 753) and with this money, which was all James had, they went on a honeymoon trip and drove to Colorado. (R. 728, Exhibit 63.) While there James and Winona, on September 21, 1932, drove to the top of Pike's

Peak. (R. 325, 724.) At about 7 o'clock, p.m., on said day, James appeared at Glen Cove, which is about seven miles from the top of the mountain, and told J. D. Rogers, superintendent of Pike's Peak Auto Highway, a privately owned road, that he had had an accident up the road but didn't know whether the automobile was badly damaged. (R. 253, 254, 255, 265, 266.)

Pike's Peak Auto Highway was unpaved but in good condition for traffic. (R. 254, 302.) James' car was the last one on the grade that evening, all other cars having checked out. (R. 289.) At the time James told Rogers about the accident, there was nothing wrong with James' clothing, they were neat and no dirt on them. (R. 267, 268.) Rogers drove to the place of the accident with James and two other men in a truck. (R. 266, 267, 313.) The accident occurred about two miles up the grade from Glen Cove. (R. 271.) While driving to the scene of the accident, James told Rogers that at the time of the accident his wife was driving the car and he was looking across the valley through field glasses. Rogers remarked to James that at that time of the night not much could be seen with field glasses, whereupon James said, "I really don't know how it happened." (R. 268, 269.) Rogers asked James how he got out of the car and James stated that he went over in the car for about fifty feet and then jumped. Rogers remarked to him that he must have made a perfect landing, whereupon James replied

that he didn't know, and that he had fallen. (R. 270.)

The truck was stopped on the road 150 feet below where James' car had left the highway. (R. 274, 277, 312, 313.) Rogers observed James' car, which was a Studebaker coupe, standing on its wheels, headed down hill and against a rock about 150 feet below where the car had left the highway. (R. 275-278, 311, 312, 724.) The left front wheel was broken and against the rock. The windshield was shattered. (R. 314, 315.) Winona was lying on the ground on the right-hand side of the car with one or both feet on the running board, and her head was down hill. Her clothing was smeared with blood and there was blood on the seat cushion and on the back of the seat on the right-hand side of the car. (R. 278, 279.) On the floor of the car was one lone tool, a hammer, with blood all over it, and there was a small blood stain on the floor near the hammer. (R. 279.) Also in the car were some bottles, one of which was one-third full of liquid of the color of whisky and which had an alcoholic odor, and the bottle bore a label of a Mexican brand of liquor. (R. 284.)

When Rogers knelt down on one knee to see whether Winona was dead or alive, he listened to her breathe and smelled a "pretty strong" odor of liquor upon her breath. (R. 279.) However, he detected no odor of liquor on the breath of James. (R. 285.) An ambulance was called and when Rogers lifted Winona he felt a softness about her head in the region of one of her ears. The ambulance

was parked on the road below the place where James' car had stopped against the rock and Winona was carried down hill to the ambulance. (R. 280.)

After Winona was taken away in the ambulance and before anyone was permitted on the road where James' car had left it, Rogers made an examination of the road in the vicinity of the switch-back where the accident occurred. Rogers directed the two men with him to stay off that portion of the road because he wanted to investigate the tracks of the car. Upon investigating these tracks he found a man's footprints which started about eighty feet back from where James' car left the road. At that point the footprints went from the left side of the car around in a circular manner to the right side and then returned in the same manner to the left side and from that point followed the automobile tracks continuously for a distance of eighty feet to the point where the automobile left the roadway. (R. 280-284, 287, 288.)

Winona was taken in the ambulance to the Beth-El Hospital in Colorado Springs where on September 21, 1932, X-ray pictures were taken of her head. (R. 385-389.) There was one wound over the right eye and one under the hair in back of the ear. (R. 326.) It was the opinion of Doctor Decker that the fractures were caused by a moderately light blunt instrument driven rapidly against the head, such as a hammer in a human hand could strike. (R. 539, 540.) Winona was operated on,

following which she began to recover from her injuries and walked before she left the hospital on October 8, 1932. (R. 325, 326.) While Winona was in the hospital, James was asked by the bookkeeper of the hospital how he would be able to take care of the hospital expense, and James said he had no means of taking care of it at the time but was going to negotiate a loan on an insurance policy. (R. 390.) Later, he borrowed $100 from Winona's father who came there from North Dakota upon being notified by James of the accident. (R. 728.)

James told Alva E. Custer, manager of the hotel in Colorado Springs where James lived while Winona was in the hospital, that he was more or less destitute of funds due to the accident, that he was going to take Winona to Manitou Springs, that there was no further use of going into debt, that she was all right, that he could take care of her as he had nothing to do, and that the doctor had cautioned him and Winona about stooping over because of causing dizziness, also against washing her hair which might cause infection in the head wound. (R. 380.)

James rented a cottage at Manitou Springs, which is about six miles from Colorado Springs, and took Winona to this cottage. (R. 383, 729.) Manitou Springs is a summer resort and the nearest occupied cottage to the one rented by James

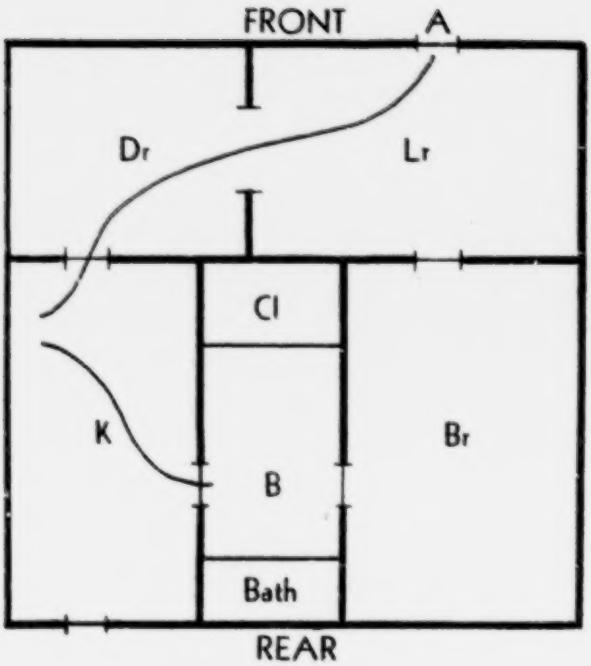
was about half a block away. (R. 339, 340, 351.) James obtained food supplies from Leonard's Grocery Store located about one mile from the cottage and on one or two occasions, he rode on the grocery truck with Gerald Rogers, while the latter delivered groceries to the cottage. (R. 352.) Gerald Rogers was a married man, 28 years of age, and was employed in Leonard's Grocery Store. (R. 339, 351, 360.)

Every day, except on the day previous to the death of Winona on October 14, 1932, Miss Grace Yarnell, a cousin of Winona and who lived at Colorado Springs, visited Winona at the cottage. On each of these visits, Winona was sitting up in bed and did not appear to be dizzy or faint. (R. 323, 326, 327, 328.) While Winona was in the hospital, Miss Yarnell took James about the city and to the hospital in her car. (R. 334, 335, 748.) On two occasions, while they were alone in the car, James attempted to kiss her and on another occasion when she was in his room at the hotel, he made advances toward her, whereupon she told him to "cut it out." (R. 330, 331.)

On October 14, 1932, shortly after lunch, James appeared at the hotel in Colorado Springs, and Alva E. Custer inquired of him the condition of Winona's health. James stated that he regretted leaving her alone at the cottage and that he had come to town to see if word had been left at the

hotel from his insurance company and thought that word might have been left there for him, as he had applied for a loan. James left the hotel about mid afternoon. (R. 379, 380, 383.) There was a bus line between Manitou Springs and Colorado Springs on ten-minute schedule, also a taxicab service. (R. 447.)

James testified that he went from Manitou Springs to Colorado Springs on a bus that day and, according to his own testimony, was back in Manitou Springs at about 4.30 o'clock that afternoon. (R. 729, 730.) James had sold his wrecked car for $25. (R. 384.) He appeared at Leonard's Grocery Store "somewhere around" 5 o'clock, ordered groceries, and asked Rogers to let him ride on the truck when he made the delivery. Shortly thereafter the groceries were delivered. (R. 341.) Upon arriving at the cottage, James and Rogers entered the front door together, James proceeding through the living room to the bedroom and Rogers proceeding through the living room, dining room and to the kitchen where he deposited the groceries. The floor plan of the cottage was described by Rogers as indicated by the following drawing and as per Defendant's Exhibit K (R. 341, 342, 343.):




The following letters indicate the following rooms:

LR—Living Room
DR—Dining Room
K—Kitchen
BR—Bedroom
Cl—Closet
B—Bath

The short parallel lines indicate doors. The capital letters A and B, together with the line running between the two letters, indicate the route taken by Rogers. (R. 342, 343, 353.)

After Rogers had entered the kitchen, James shortly thereafter came into the kitchen through

the doorway from the dining room. (R. 344.) James opened the door to the bathroom from the kitchen and entered the bathroom and stepped back into the kitchen and called Rogers, whereupon Rogers and James went into the bathroom. Rogers then saw Winona lying naked and apparently dead in the bathtub, which was about four feet in length, on her back with her head under the faucet end of the tub, her feet over the rounding edge of the tub, her face at about the surface of the water with the water just barely covering her nose and mouth; her eyes were open, the water in the tub was luke warm and soapy, and her body was warm. James and Rogers then carried the body of Winona from the bathroom through the doorway leading into the bedroom and placed her on the bed. (R. 346, 347, 350, 353, 357-360.)

At about 6 o'clock that evening Dr. George B. Gilmore, a practicing physician and coroner of the county, arrived at the cottage and observed the body of Winona lying on the bed in the bedroom, observed the bathtub was about one-third full of soapy water, and observed a wash basin in the bathroom. (R. 361-363, 369, 370.) He talked to James who told him that he had gone that morning to Colorado Springs and waited over for the afternoon mail; that he returned to Manitou Springs and purchased groceries; that he then went to the cottage; that he didn't find his wife in the bedroom; that he looked in the bathroom and found her in the

bathtub; that the delivery man from the grocery store was in the house at the time and the two of them had taken her from the tub and placed her on the bed; that he had found the Ivory soap carton on the kitchen table or drainboard out of its position and he presumed that some of these soap flakes had been put in the tub after the water had been drawn; that Winona had previously sustained a head injury and had been in a hospital and while in the hospital, she had requested the doctor and nurses to shampoo her hair and the request had been repeatedly refused; that since living in the cottage she requested him to shampoo her hair which he refused to do because the doctor ordered that her hair be not washed; that when he left the cottage that day, she was in bed where she had been instructed to stay and he assumed that she had taken advantage of his absence and had gone to the bathroom, had run water in the tub, put Ivory flakes in it, and that her body was unclothed with her nightgown in the corner of the bathroom. (R. 363, 364.)

Dr. Gilmore told James that it would be a good plan to have an autopsy on the body "so that we might better know exactly what had been the cause of death." James replied, "he just couldn't permit anything of the sort, and much preferred that I wouldn't have the autopsy." (R. 365.)

Dr. Gilmore made out a death certificate showing the cause of death as drowning. (R. 746.) He

testified that it is necessary that the cause of death be first ascertained before the body is permitted to be buried or removed from the county. (R. 372.)

On October 20, 1932, Winona was buried in Forest Lawn Memorial Park, Los Angeles, California. (Exhibit 64.) The $5,000 policy of insurance in the Prudential Life Insurance Company of America, which provided for double indemnity in case of death by accidental means, contained the following provisions: "The amount of accidental death benefit * * * payable * * * upon receipt of due proof that the death * * * occurred * * * as a result, directly and independently of all other causes, of bodily injuries, *effected solely through external, violent and accidental means*, of which, except in case of drowning or of internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and that such death occurred within ninety days of the accident, * * *." Exhibit 62.)

On October 21, 1932, James with the aid of Pries, the insurance salesman from the Prudential Life Insurance Company of America, drafted a letter which James sent to Doctor Hanford, attending physician of Winona when she was in the hospital, and also a letter to the Swan Funeral Home in Colorado Springs. (R. 405.) In the letter to Doctor Hanford James stated that, "In going through the insurance papers we find that there is a clause which relieves the company from pay-

ing for accidental drowning except it is directly caused by another accident which we all know is true in this case, if she was drowned. The coroner's decision as it now stands may make it impossible for us to collect the insurance * * * but we are told that if the real cause of this accident is told in the death certificate we will have no difficulty in collecting * * *. We know you will do everything you can for us and wonder if you could have this verdict changed or add the words 'cause by cerebral hemorrage' or words to that effect. * * * We expect a quick settlement but owing to the incomplete statement on the death certificate we are told there is apt to be a delay unless this is completed before the claim is sent in. * * * We claim that her death was directly caused by her serious injury in the automobile accident." (R. 368, 369.)

In the letter to the Swan Funeral Home, James stated that, "After looking over my insurance papers I find that the company may not pay for accidental drowning. I wish you would get in touch with Dr. Hanford and assist him in having the coroner's certificate changed. I am sending you a copy of the letter which I have sent to the doctor so that you will know what I have told him. * * *" (R. 368.)

Dr. Gilmore received from Dr. Hanford the two letters hereinabove mentioned and changed the death certificate to read that the primary

cause of death was accidental drowning with a contributing cause as skull fracture and head injury sustained on September 21st at the time of her injury in the automobile. (R. 366, 372.) He did not know, and Dr. Hanford never told him, that cerebral hemorrhage was a contributing cause of death. (R. 371.) Neither did he know the circumstances surrounding the automobile accident on Pike's Peak, particularly as to the finding of a bloody hammer in the car, the blood on the cushion and on the back of the right-hand side of the seat, and the body out of the car on the right-hand side thereof, nor as to James' claim that she was driving the car at the time of the accident. (R. 373, 375.) Dr. Gilmore forwarded four copies of the death certificate, as amended, to James in Los Angeles, California. (R. 367.)

On October 26, 1932, James presented to the Prudential Life Insurance Company of America his claim and proofs of death setting forth the cause of death as "Accidental Drowned in Bath tub Fractured Skull Auto Accident." (Exhibit 63.) On January 18, 1933, the Prudential Life Insurance Company of America issued its check to James in the amount of $10,092.10 which he cashed in payment of all claims under the policy with that company. (R. 731, Exhibit 65.) On December 15, 1933, James received from the Policy Holders Life Insurance Association the sum of $3,000 under the policies with that company. (Exhibit 70.)

## 2. Evidence Relating to the Murder of Winona James Did Not Come Without Notice to Petitioner

The foregoing evidence, relating to the first wife, Winona James, was established by witnesses residing in both California and Colorado. The taking of the life of Winona James occurred as a result of a scheme executed partly in California and partly in Colorado. The actual drowning, together with the contributory cause of death, the Pike's Peak episode, occurred in Colorado while all prior steps, including the selection of the victim, the obtaining of double indemnity upon her life, the borrowing of money upon her insurance with which to take the trip to Colorado, and her final burial after death, all occurred in California.

It is true that the indictment upon which James was tried and convicted merely charged him with the murder of Mary Emma James and that he was not therein accused of the murder of Winona James. He was not, as he asserts, tried for the death of Winona James in the proceeding at bar, as is shown by the instructions hereinafter mentioned, given to the jury by the trial court.

The record shows that James was questioned prior to his indictment about the death of Winona James. (R. 374.) At the commencement of the trial the opening statement of the people indicated that testimony of this kind would be offered. (R. 688, 689.) At the trial during the direct examination of witness J. D. Rogers the question of

relevancy and admissibility of the evidence, relating to the murder of Winona James, was argued at length by counsel for the prosecution and defense, at which time numerous authorities were cited and no contention was then or at any other time made that the defense was taken without notice. During the discussion counsel for James admitted he had researched the question and was prepared on the law applicable to the matter of the admissibility of this evidence. (R. 259, 260.)

### 3. Process of Court Was Available to Petitioner

Under the law of California, a defendant has the right to take depositions of witnesses who do not reside within the jurisdiction of the courts of California and thus secure unto himself the benefit of such testimony.

Penal Code, Sections 1349 to 1362.

At the conclusion of the prosecution's evidence in chief, counsel for James requested a continuance for the purpose of taking the deposition of "the witness who had communicated to us and such other witnesses as we may find at Colorado Springs." (R. 684.) The witness who had communicated with the defense did so by letter, postmarked June 24, 1936, and the matter was first called to the attention of the Court on July 9, 1936. (R. 685, 688.) The prosecution resisted the motion for a continuance for lack of sufficient showing of the specific matter which the witness would testify to, except in

regard to the general appearance of Mrs. James; further that the prosecution had been willing to take the deposition at any time upon stipulation, but no such request had been made; also that there was no necessity for a continuance in order to obtain the deposition. (R. 688.) The court denied the request for a continuance because of the insufficiency of the showing therefor. (R. 690.) However, there was ample time within which to take such deposition as the evidence was not concluded until July 20, 1936 (R. 820), and the motion was not renewed.

It is well-settled law in California that a motion for a continuance must be supported with affidavits setting forth facts warranting the trial court in granting the application.

*People* vs. *Rokes*, 18 Cal. App. (2d) 689, 694.

It is elementary that the matter of continuance rests within the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action of the trial court in such a case a denial of due process of law.

*Franklin* vs. *South Carolina*, 218 U. S. 161, 168, 169, 30 S. Ct. 640, 54 L. Ed. 980;

*Minder* vs. *Georgia*, 183 U. S. 559, 22 S. Ct. 224, 46 L. Ed. 328;

*Van Dam* vs. *United States*, 23 Fed. (2d) 235.

## 4. Relevancy of the Evidence Relating to the Murder of Winona James

Where one is charged with murder it is within the discretion of the trial court to permit the introduction of evidence tending to establish a prior murder, where the proof of such prior murder tends to throw light upon a particular fact or explain the conduct of a particular person, which fact or conduct has a bearing upon some issue in the case for which a defendant is tried. Because of the discretion in the trial court, the ruling by said court, permitting the introduction of such evidence, will not be disturbed unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors. There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony, and observed the conduct of the parties and witnesses, is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter.

*Moore* vs. *United States*, 150 U. S. 57, 60, 14 S. Ct. 36, 37, 37 L. Ed. 996;
*People* vs. *Smith*, 13 Cal. (2d) 223, 227.

It is the settled law of California that where the accused is on trial for the murder of his second wife the prosecution may introduce evidence as to the death of the first wife and the fact that her life was

insured with the accused as beneficiary to show the motive of accused in the murder of his second wife.

*People* vs. *Gosden*, 6 Cal. (2d) 14, 24.

Proof of other acts similar to the one for which the defendant is on trial has been repeatedly approved for the purpose of showing motive, intent and purpose of the actor, by the appellate tribunals of California and the Supreme Court of the United States, in the following cases:

*People* vs. *Pozzi*, 91 Cal. App. 150, 158, 159;
*People* vs. *Burns*, 16 Cal. App. 416, 420, 421;
*People* vs. *Poo On*, 49 Cal. App. 219, 223;
*People* vs. *Egan*, 133 Cal. App. 152, 157, 158;
*N. Y. Mutual Life Insurance Co.* vs. *Armstrong*, 117 U. S. 591, 29 L. Ed. 997;
*Wood* vs. *United States*, 16 Peters 341, 10 L. Ed. 987, 41 S. Ct. 339.

Evidence of similar transactions is admissible where the object thereof is to show system or design. Such evidence has repeatedly been held in California to be admissible.

*People* vs. *McGill*, 82 Cal. App. 98, 102, 103;
*People* vs. *Stutsman*, 66 Cal. App. 134, 138;
*People* vs. *Barnes*, 111 Cal. App. 605, 613;
*People* vs. *Francisco*, 112 Cal. App. 442, 444;
*People* vs. *Cosby*, 137 Cal. App. 332, 334, 335;
*People* vs. *King*, 4 Cal. App. (2d) 727, 730-731;
*People* vs. *Deysher*, 2 Cal. (2d) 141, 148, 149.

Where it is claimed by the accused that the act in question was innocently or accidentally done, or done by mistake, or where the evidence is susceptible to

such an inference, proof of other acts of the same general character is admissible to show that the act in question was the product of a designing mind rather than the result of mistake, accident or misfortune. This principle has been applied in murder cases in California and other States:

*People* vs. *Craig*, 111 Cal. 460, 468, 469;
*People* vs. *Morani*, 196 Cal. 154, 160;
*Commonwealth* vs. *Snell*, 189 Mass. 12, 75 N. E. 75, 3 L. R. A. (N. S.) 1019;
*Holt* vs. *United States*, 42 Fed. (2d) 103, 106, 107,

as well as in the famous English bath tub murder case of R. vs George Joseph Smith, Criminal Appeal Reports, Volume XXI, p. 229, at pages 231, 236 and 237. At the trial of George Joseph Smith, the trial court used the following illustration in instructing the jury with regard to the manner in which they could consider the proof that the prisoner had had two other wives die by drowning in a bath tub subsequent to the drowning of the wife for which he was then on trial. The actual instruction may be found in the series entitled "Notable British Trials" printed by the Canadian Law Book Company, Ltd., and the volume containing the trial of George Joseph Smith, as edited by E. R. Woodson, at pages 274 and 275. We recognize that the work referred to may perhaps not be considered an authentic work, and thus not a proper source from which an official citation may be gleaned. The citation about to be quoted from the aforesaid famous trial is given solely for the

purpose of giving due credit to that source for the idea hereinafter contained. We adopt the idea as our own, for the purposes of illustrating the view taken by the trial court in permitting the introduction of the evidence relating to the prior wife, Winona Wallace James. It aptly illustrates the persuasive effect of other acts of a similar nature.

"You may use the evidence as to the other deaths for this purpose—to see whether it helps you as to whether the death of Miss Mundy was accidental or designed. It is putting it in a different way, but you may use it for this purpose; if you think that the prisoner has a system of obtaining money from women by going through the form of marriage with them and then getting the money either by robbery or murder, you may use the evidence of the other deaths for that purpose.

"Now, I want to give you one or two illustrations of that sort of thing, in order that you may exactly understand for what purpose you may use these other deaths. Let us get away from crime for a moment. You are playing cards for money with three men; suddenly in the pocket of one of them is found a card of the pack you are playing with. Possibly your first view would be—it would depend a good deal on what sort of a card it was; if it was a 'two' of one of the suits that was not trumps you would not think very much of it. Cards do sometimes tumble into odd places. If it happened to be the ace of trumps in the game you are playing at that time you might regard the matter with more suspicion, and, perhaps in view of the

fact that cards do tumble about, you might say that in that one case only you could not form any opinion about it. But supposing on your mentioning it to some one else it turned out that on five previous occasions of playing for money the gentleman had had the fortunate accident of finding the ace of trumps in his coat pocket, what would you think then? What the law says you may think is that that series of fortunate accidents does not usually happen to the same person so many times, and that you may draw from that series of fortunate accidents the inference that it was not an accident at all, but that it was designed. That illustrates the way in which you may use, in dealing with a criminal case, the occurrence, the repeated occurrence, of the same accident to a person who benefits by the accident each time."

Proof of the prior commission of acts of a similar nature by one on trial has been recognized as some evidence of the identity of the perpetrator of a particular crime. This rule has been recognized in the State of California and in other States and by the Supreme Court of the United States.

*Boyd* vs. *United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077;
*People* vs. *McWilliams,* 117 Cal. App. 732, 736;
*People* vs. *Sindici,* 54 Cal. App. 193, 197, 198;
*State* vs. *King,* 111 Kan. 140, 206 Pac. 883, 22 A. L. R. 1006.

### 5. Trial Court's Instructions to the Jury

It must be assumed, in view of the absence in the record of the instructions given by the trial court, that the jury were duly and properly instructed as to the purpose for which this evidence was admitted and the extent to which it could be considered by the jury in passing upon the guilt or innocence of the accused. In the opinion written by the Supreme Court of the State of California, it is said:

> "In its instructions to the jury, several of which were requested by the defendant, the court below properly limited the purpose for which the jury might consider this evidence.' (R. 1107.)

### Conclusion of Point III

We respectfully urge that petitioner's claim that he was denied due process of law, guaranteed by the Fourteenth Amendment of the Constitution of the United States, relative to the introduction of evidence of the Colorado affair, is unfounded. This evidence was not admitted generally, but only for limited purposes, and petitioner had notice that such evidence would be offered at his trial and process of the court was open to him to take depositions if he so desired. The relevancy of this evidence was argued at length before the trial court and twice passed upon by the Supreme Court of the State of California, first, in its original opinion and later in a subsequent opinion rendered on a rehear-

ing. The trial court was not informed that any particular witness was desired by petitioner or that any witness would testify if produced to any particular matter if his presence could be secured in connection with the application for continuance. It does not appear by affidavit, or otherwise, that any person, either in California or Colorado, who had knowledge of facts favorable to petitioner, had declined to attend the trial.

Assuming for the sake of argument, that the trial court erred in receiving the evidence relating to the murder of Winona James in Colorado, nevertheless, such an error does not raise a Federal question within the meaning of the Fourteenth Amendment of the Constitution of the United States. In order that it may be said that due process of law has been denied to petitioner, it must affirmatively appear, not only that error was committed by the trial court, but further, that the error was so gross as to amount to no trial at all, as that term is ordinarily understood.

*Re Converse*, 137 U. S. 624, 34 L. Ed. 796, 11 S. Ct. 191;

*Arrowsmith* vs. *Harmoning*, 118 U. S. 194, 30 L. Ed. 243, 6 S. Ct. 1023;

*American R. Express Co.* vs. *Kentucky*, 273 U. S. 269, 71 L. Ed. 639, 47 S. Ct. 353;

*Roberts* vs. *New York*, 295 U. S. 264, 79 L. Ed. 1429; 55 S. Ct. 689;

*Howard* vs. *Kentucky*, 200 U. S. 164, 50 L. Ed. 421, 26 S. Ct. 189.

## IV. PETITIONER CLAIMS THAT THE TESTIMONY OF THE WITNESS CHARLES H. HOPE WAS FALSE AND KNOWN TO THE PROSECUTION TO BE FALSE AND THEREFORE THE TRIAL WAS A MERE PRETENSE AND WAS IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

This point was presented to the Supreme Court of the State of California in two ways: First, by a petition for rehearing filed October 25, 1939 (R. 842), wherein were set forth copies of affidavits theretofore filed in the Superior Court of the State of California, in and for the County of Los Angeles, by the witness Charles H. Hope in connection with a motion therein on his part to secure an order setting aside the judgment and granting him leave to withdraw his plea of guilty theretofore entered in the case and to substitute a plea of not guilty (R. 885, 891); second, by a petition for a writ of habeas corpus filed October 31, 1939 (R. 1, No. 134), wherein petitioner stated:

> "That this court has before it the entire records, files and exhibits in the said case, and that each and every part of the testimony of all the witnesses, exhibits, files, records and affidavits presented on the trial of said case are made a part of this petition by reference, as though herein fully set forth." (R.15, No. 134.)

Obviously, under well settled rules of practice, the Supreme Court of California would not consider these affidavits (filed after a motion for new trial had been denied and judgment rendered in the lower court) in connection with petitioner's appeal, as the matters which could be considered on appeal were limited to the proceedings in connection with the trial, application for a new trial and judgment in the lower court. However, the matter if properly presented could have been passed upon and evidently was passed upon in ruling upon the petition for a writ of habeas corpus. We shall therefore consider the matter as presented by the petition for writ of habeas corpus and the Court's refusal to issue such writ.

The affidavits of the witness Charles H. Hope (R. 920-936) were sworn to by Hope on June 22 and 28, 1939, a period of time approximately three years after Hope had been sentenced to imprisonment in San Quentin for life. (R. 928.) These affidavits consist largely of statements of conclusion of fact intermixed with law with frequent reference to the language of Mr. Justice Seawell of the Supreme Court of California, in his dissenting opinion in the instant case. The affidavits were obviously filed by Hope for the purpose of trying to escape punishment for his crime. In them he states his opinion that petitioner James "was in such a condition of mind as to be temporarily incompetent whether from alcohol or otherwise, and his evi-

dence hence of no value (Mythomania), at the time James found the dead body of his wife, following a long series of attempts on her own part to commit the crime and wrong of abortion," etc. (R. 924.) He further says that he "does not believe that defendant James was capable of understanding what he was saying or doing, due to intoxication and mental condition then present." (R. 824.) This is followed by some conclusions on the subject of affiant's ideas as to whether decedent may have tried to commit an abortion. (R. 924-925.) He says that the "theory of the prosecution of death by rattlesnakes was and is a false one and was known to the State prosecuting officials to be false." (R. 926.) Numerous other matters of opinion and conclusion are contained in the affidavits. Interspersed with these matters are a few statements of fact. Affiant avers that the State knowingly and wilfully produced false testimony that the rattlesnakes had bitten the deceased when "as a matter of fact affiant refused to so testify and said that the story was all 'bunk' or untrue." (R. 926.) He further says that he told some of the prosecuting officers that "to his knowledge no rattlesnake ever bit or poisoned James' wife" but that the officials induced him falsely to so testify. (R. 926.) He also states that he had been instructed to testify to the story "that they had given me and that had been gone over by them with me hundreds of times" and that he should testify

that he had not discussed what he proposed to testify to with anyone and had not been promised anything although this was untrue. (R. 927.) He says that Detective Southard told him it was absolutely necessary to say that he saw the snake bite the woman which affiant refused to do and that then Southard threatened him. (R. 927.)

His contentions in this regard are summed up by him as follows:

> "However, the thing is simply this as far as I'm concerned,—all its doctrines were conceived in error, founded on fallacy, propagated by falsehood and are, in short, puerile, idiotic and utterly asinine." (R. 927.)

In his second affidavit he expressly states that the three specific instances of the knowing inducement and use of false testimony by State officials are that (1) the snake bit and poisoned the decedent; (2) no promises of leniency or reward had been made to affiant; and (3) no threats had induced the false testimony. (R. 932.) He then repeats some of the matters hereinbefore adverted to.

The above assertions contained in the affidavits of the witness Hope coming at a time nearly three years after he had commenced to serve his sentence, incoherent though they are and lacking in that specific detail which would give them much value as evidence, were presented to the Supreme Court of California together with all of the evidence adduced at the trial. Consequently, said Supreme Court had

before it a great mass of evidence which was entirely in conflict with the statements contained in Hope's affidavits. As has already been set forth in this brief, Hope had testified in detail to the procuring of rattlesnakes and as to the circumstances surrounding the death of Mary James. His testimony with respect to procuring the rattlesnakes was corroborated by the testimony of the witnesses Roland H. Kirby (R. 190), Mike Allman (R. 195-197), Joe Houtenbrink (R. 202-204), Mrs. Edna Hope (R. 178-184), and the confessions of petitioner James. (R. 643-647.) His testimony about having obtained boxes with glass covers in which to keep the snakes was corroborated by the witness Irving Sherman (R. 199-200) and his testimony with reference to the disposition of the boxes was corroborated by the testimony of the witness Mrs. Edna Hope. (R. 182.) His statements in the affidavits to the effect that the snake did not bite Mary James is in conflict with his testimony at the trial. He testified on direct examination simply that her foot was put in the box with the snake. (R. 75.) However, on cross examination he testified that the snake struck her in the region of the lower part of the foot (R. 154) and subsequently on further cross examination he stated in detail that he was watching the snake, saw the snake strike, and the position of Mary James' foot with relation to the interior of the box, and the position of the snake. (R. 667.)

His statements in his affidavits to the effect that he had been coached and instructed what to say is in sharp conflict with his testimony to the opposite effect. (R. 173-176.) He also testified in the course of the trial, on cross examination, that at the time he was arraigned in the superior court a few days before the trial, the indictment was read to him and that upon being asked to state his plea he said he was guilty and personally interposed that plea. (R. 176.)

Hope's statement in his affidavits to the effect that he had been held incommunicado for 18 days is in conflict with his statement at the trial to the effect that he had been out of the county jail with the officers in connection with the preparation of the case for trial one time only and that at that time he went to his home and to the United States Post Office to get his bonus. (R. 174.)

The statement of Hope in his affidavits to the effect that Mary James had not been struck by a rattlesnake is controverted to an extent at least by the testimony of Dr. Wagner, the autopsy surgeon, and Dr. Boehme, to the effect that Mary James' foot bore a laceration and her leg evidenced a swelling and cellulitis of such character as might be caused by the bite of a rattlesnake. (R. 97, 110.)

We thus have presented a situation where the Supreme Court had before it for consideration, in determining whether to grant a writ of habeas corpus, the entire record in the proceeding which was made a part of the petition, including the testi-

mony given by Hope and all other witnesses, as opposed to the matters set forth by Hope in his affidavits. The burden was on petitioner to show a right to the writ.

The overwhelming weight of the evidence as disclosed by the record was to the effect that Hope had not testified falsely and that his belated claim to that effect was merely the effort of a guilty man to escape the punishment which he was suffering for his crime.

Under these circumstances the Supreme Court denied the petition for writ of habeas corpus, without prejudice (R. 17), thereby leaving the matter in such state that if the petitioner could thereafter make a reasonable and clear showing of his right to a writ of habeas corpus, the Supreme Court of California was still in a position, upon a proper showing, to grant such a writ.

Under these circumstances we respectfully submit that there is still available to the petitioner, if he can make a proper showing, a remedy under the laws of the State of California under the principles set forth by this honorable Court in the case of *Mooney* vs. *Holohan*, 294 U. S. 103, 55 S. Ct. 340.

It clearly appears that, if a proper showing is made to the Supreme Court of the State of California, it still has jurisdiction, has not cut the petitioner off from the right to apply for a writ of habeas corpus to that Court, and that, if such showing can be made, "recourse should be had to what-

ever judicial remedy afforded by the State may still remain open." (*Mooney* vs. *Holohan, supra.)*

Therefore, it is respectfully submitted that neither the due process clause nor the equal protection clause of the Fourteenth Amendment of the Constitution of the United States was violated by the introduction in evidence of Hope's testimony. The weight of the evidence presented to the Supreme Court of the State of California was to the effect that his testimony was not false. It is further submitted that if a proper showing is made by petitioner, there is still available to him the judicial processes of the State of California. Consequently, under the rule in the case of *Mooney* vs. *Holohan, supra*, this Court will not act.

## V. PETITIONER ASSERTS THAT HE WAS DEPRIVED OF THE RIGHT OF COUNSEL AFTER HIS ARREST AND AT THE TIME HE WAS INTERROGATED AND THAT THEREFORE THE USE OF HIS STATEMENTS CONSTITUTES A VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In support of this point petitioner has referred in his brief to *Powell* vs. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, and other cases in which the right of accused to counsel is set forth.

The Constitution of the United States provides that an accused shall have "the assistance of coun-

sel for his defense." (United States Constitution, Sixth Amendment.) The Constitution of the State of California provides that the accused shall have the right "to appear and defend, in person and with counsel." (Constitution of California, Article I, Section 13.) The respondent does not question the right of petitioner or any other person accused of a crime to have the advice or assistance of counsel in all stages of the proceedings. It is submitted, however, that this constitutional right, whether arising under the express provisions of the California Constitution or by necessary implication under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States is a right to counsel at all times from the time that the criminal proceeding is instituted until its completion. This right of course includes the right to consultation with such counsel, and adequate opportunity to defend the case at all stages.

As to the right of an accused to have counsel subsequent to his arrest and prior to any proceeding in court against him, petitioner directs attention to Section 825 of the Penal Code of the State of California which provides *inter alia* that any officer having charge of a prisoner who wilfully refuses or neglects to allow an attorney, who has been requested by the prisoner or a relative, to visit the prisoner is guilty of a misdemeanor, which provision, of course, has no bearing upon the question

of whether the due process or equal protection clause of the Fourteenth Amendment of the Constitution of the United States has been violated.

Be that as it may, the record herein of the testimony of the people's witnesses, which was believed by the trial court and jury, and the testimony of his own counsel, does not bear out the assertions of petitioner that he was held incommunicado for two days and nights in a private home without being taken before the nearest and most accessible magistrate and without being allowed the counsel of his choice; that thereafter he was held in jail, in the "High Power Tank," and was constantly under observation and his counsel visited him only once, and that he was told, when he asked the officers to call attorney Parsons, it would take too long to inform Parsons about the case. (We are unable to insert page reference to the above in petitioner's brief because at the writing hereof, respondent has been served with only a typewritten copy of said brief.)

The record discloses that about the twenty-second of March, 1936, J. E. Southard, an investigator for the district attorney's office, commenced an investigation into the death of Mary James, and while investigating this matter, he arrested James on a felony committed in his presence, i.e., the crime of incest on Sunday, April 19, 1936, at about 9 o'clock a.m. (R. 456, 458, 463, 560, 561); that James was taken before the district attorney who questioned

him about the incest and showed him a typewritten statement made by James' niece Lois Wright, confessing the offense, at which time James refused to talk to the district attorney (R. 466-468); that at about 5 o'clock that afternoon, James was taken to a house adjacent to the one he was living in and questioned by the police and investigators of the district attorney's office (R. 555, 560); that he was returned to the district attorney's office on Monday, April 20, 1936, where James conferred with his counsel, Mr. Silverman (R. 571); that on April 21, 1936, at about 10 or 11 o'clock a.m., James was booked in the county jail (R. 576) and on this same day he was arraigned in the superior court on the crime of incest and was represented at the arraignment by his attorney, Mr. Silverman (R. 483); that between the time of his arraignment on said charge of incest and May 2, 1936, his attorney, Mr. Silverman, visited him in the county jail on April 25, 1936, and saw him on several days thereafter until about a week later at which time Mr. Silverman called upon petitioner in the attorneys' room at the county jail and advised him that if questioned, not to answer any questions unless it was in his (Silverman's) presence (R. 481, 482); that James was not again interviewed by the authorities until about 11.45 a.m. (Saturday), May 2, 1936, at which time he was taken to the Chaplain's room in the county jail and told in the presence of Hope, who was arrested on May 1, 1936, that Hope had confessed

and he (James) was asked if he had any statement to make relative to anything stated by Hope which incriminated him (James) in the death of Mary James and answered, "nothing" (R. 493, 494, 630, 631, 732, 733); that later in the afternoon of May 2, 1936 (R. 624), James was again interviewed by the authorities in the office of the district attorney at which time he asked if he couldn't have a chance to ask his attorney whether he should answer questions and was told that they were attempting to get in touch with Mr. Silverman; that James was present during the telephone conversation and it was communicated to him that Mr. Silverman was at Murrieta Hot Springs; that James asked for an attorney whose name he didn't know (R. 625); that inquiry wa made as to who the attorney was and those present concluded it was Mr. Parsons (R. 626); that an effort was made to get in touch with Mr. Parsons, but "we were unable to"; that thereafter James did not say he didn't want to proceed without an attorney being present and did not thereafter ask for another attorney (R. 628); that shortly before midnight, James said to Deputy Sheriff Killion, in the presence of Deputy Sheriff Gray, "Why don't we go out and get something to eat, and I will tell you the story"; that Killion said, "All right"; that in Killion's automobile they went to a restaurant at 5th and Figueroa Streets, and upon being seated, Killion said to James, "Well, do you want to tell us the story now?"; that James

said, "No, let's have something to eat, first"; that they ordered a steak dinner; that after dinner was finished they bought cigars and James had a cigar; that James said, "Now, you want to have this story?"; that Killion said, "Yes"; that James said, "All right, there is no hurry, is there?"; that Killion asked James if he wanted to go back to the office to tell the story and James said, "No, this is all right, isn't it?"; that Killion said, "Sure, it is all right." (R. 633.) James, thereupon, related the circumstances surrounding the death of Mary James (R. 634-639), at the conclusion of which James said, "Now, that is the story, and I never would have told it if Hope hadn't squealed. There isn't enough men in the district attorney's office to make me talk." (R. 639.) Later, James again told his story while in the office of the district attorney, which story was reduced to writing. On May 6, 1936, he was indicted with Hope for the murder of Mary James. (R. 815.)

At the time petitioner confessed his participation in the murder of Mary James, he had been informed by his own counsel and believed that he was going to be indicted for murder. Petitioner's testimony on this matter is as follows:

> "Q. By the way, had Mr. Silverman, before you were taken to the Chaplain's room, given you any instructions as to what you should do if you were questioned further by the officers?
>
> "A. He had.

"Q. What instructions did he give you?

"A. He told me I was going to be indicted for murder and if the officers questioned me to tell them that I wouldn't talk unless he was there.

"Q. When Mr. Silverman told you that you were going to be indicted for murder, did you believe that you would be?

"A. I did."—(R. 494, 495.)

It thus appears that petitioner's assertions, heretofore related, are not sustained by the record above recited. He was not as he claims held incommunicado for two days and nights, but conferred with his counsel on Monday following his arrest on Sunday. He was not as he claims visited by his counsel only once, but was visited by his counsel several times between April 21, 1936, when he was arraigned in court on the incest charge, and the filing of the indictment against him for murder. He was not as he claims told that it would take too long to inform attorney Parsons about the case, but that an effort was made to get in touch wih Mr. Parsons, which effort proved futile. This was in the afternoon of May 2d, (a Saturday).

Petitioner seeks to have read into the due process and equal protection clauses of the Fourteenth Amendment a certain canon of professional ethics, i.e., that a lawyer should not in any way communicate upon the subject of controversy with the opposite party but only with his counsel and if not represented by counsel, to avoid doing anything

which might mislead him. Obviously, such canon has reference to civil and not criminal matters and it is doubtful whether the courts will go so far as to include the same in the organic law.

The appellate court of California has had before it for determination instances in criminal cases where error was claimed to have been committed by the trial court in permitting the introduction in evidence of an accusatory statement when the record showed that the accused had remained silent upon advice of his counsel. The court held that such circumstance might affect the probative weight but not the admissibility of such evidence. (*People* vs. *Graney*, 48 Cal. App. 773, 775; *People* vs. *Wilson*, 61 Cal. App. 611, 621.)

## CONCLUSIONS REACHED BY SUPREME COURT OF CALIFORNIA

Pertinent conclusions were reached by the Supreme Court of the State of California when passing upon the merits of petitioner's appeal and we quote some of them which pertain to the subject under discussion, namely:

> "That he was questioned for many hours is not, of itself, improper, particularly when, as testified, he freely responded thereto. Some recognition must be given to the practical problems presented in the work of crime detection. A reasonable conclusion, and one which the trial court and jury might have readily reached on all the evidence, is that the defendant broke

down and confessed his participation in the crime only after his confederate and accomplice had been arrested and detailed the murder conspiracy and had been brought face to face with the defendant who had been informed of the details of his confederate's story. Each case must turn on its own facts and we therefore give but passing mention to the authorities relied on by the defendant." (R. 1101.)

"Regardless of the impropriety of holding and continuously examining the defendant for many hours in a place other than a county jail prior to the filing of any charge against him, a course which we expressly disapprove, it is of the utmost significance that a confession was neither obtained nor extracted from the defendant during such period. The record definitely discloses that this treatment of which defendant here complains failed of its asserted objective. In other words, no matter how improper the treatment of defendant between April 19th and 21st, a confession did not result therefrom. It was not until May 3, 1936, twelve days later, that the confession sought to be introduced was obtained. In this respect, the evidence shows that the defendant was removed from the private house when he had been held and booked at the county jail on April 21st. One of his counsel took the stand and testified that he saw the defendant in the county jail on April 25th, at which time he instructed the defendant not to answer any questions in his absence. On cross-examination, said counsel admitted that 'he saw the defendant 'when he was arraigned' on April

21, 1936. It is apparent, therefore, that the defendant was not held incommunicado when the confession was forthcoming. He had enjoyed the benefit and association of counsel and had been before the grand jury and the court. It is also of the utmost importance that the defendant did not confess until after Hope, his accomplice, had been arrested on May 1st and had told the story to the officers in charge of the investigation. The defendant's confession followed within two days thereafter." (R. 1097, 1098.)

For the foregoing reasons, petitioner's assertions under this point are without merit.

## VI. PETITIONER CONTENDS THAT HE WAS DENIED EQUAL PROTECTION OF THE LAWS

In support of his argument under this point, petitioner quotes the following language in *Yick Wo* vs. *Hopkins,* 30 L. Ed. 220, 227:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Petitioner attempts to apply this doctrine to his case by arguing that although the laws of California provide the right of counsel from the very commencement of one's arrest for crime and

the benefit of counsel at all times thereafter, and provide that he shall be taken immediately (without unnecessary delay, Section 849 Penal Code) before the nearest and most accessible magistrate, such laws were applied and administered by the officers of the law as to him with an evil eye by taking him to a private house adjoining his home and showing him the dictograph apparatus and by an evil hand by Officer Southard committing battery upon him.

This Honorable Court used the above quoted language in *Yick Wo* vs. *Hopkins, supra,* in passing upon the validity of an ordinance of the City and County of San Francisco regulating laundries where the facts in the case showed that the board of supervisors withheld permission to two hundred or more Chinese subjects to carry on such business and had granted permission to eighty others, not Chinese subjects, to carry on the same business under similar conditions.

The equal protection clause of the Fourteenth Amendment of the Constitution of the United States has to do with the application of laws and not with individual invasion of individual rights. (*Civil Rights Cases*, 109 U. S. 3, 9.) Mere error of judgment on the part of officials will not support a claim of discrimination. (*Sunday Lake Iron Company* vs. *Township of Wakefield*, 247 U. S. 350, 352, 62 L. Ed. 1154.) The equal protection clause has to do with intentional and systematic

discrimination by the law itself or by those charged with its enforcement. (*Smith* vs. *State of Texas*, 61 S. Ct. 164, 165.) No case has been cited by petitioner in which the equal protection clause has been applied or discussed in a situation comparable to that claimed by petitioner herein.

This equally applies to his assertions that he was unjustly discriminated against by reason of the confessions, the rattlesnakes and the Colorado affair being introduced in evidence, and being questioned in the absence of his attorney.

## CONCLUSION

In conclusion, we respectfully submit that an analysis of the record demonstrates:

(1) That petitioner's confessions were not coerced from him by threats, bodily injury, mental torture or any other form of coercion; but were the product of his own volition, made because his accomplice had "squealed" and because he desired, in view of the indictment for murder which he believed was to ensue, to place himself in a more favorable light than that in which the statements of his accomplice had shown him.

(2) That the identification, receipt in evidence and exhibiting to the jury of the rattlesnakes which were used in the plan to murder Mary James, were in accord with well established usage and warranted by ample judicial precedent. Their production did not create an "atmosphere of terror" nor unduly excite or prejudice any person against petitioner.

(3) The so-called "Colorado evidence" was received under well recognized and often applied rules of evidence. The fact that witnesses are brought from afar is no reason their testimony should be excluded. Under California statutes petitioner had the right to take depositions. He had ample notice (if such is required) of the purpose of the prosecution to offer evidence of the circumstances of the death of his former wife.

(4) The claim of perjury set forth in the affidavits of Hope is overcome by the other evidence incorporated in the record and placed before the Supreme Court of California to weigh in determining whether to issue the writ of habeas corpus. Therefore that court was justified in denying the petition for the writ. Moreover, said court denied said application without prejudice, leaving to petitioner the right upon a sufficient and proper showing to again apply for a writ of habeas corpus.

(5) Petitioner was not denied the right either to see, consult with, or to be represented by counsel; but, on the contrary, had counsel of his own choosing from the day after his arrest until the conclusion of the case.

(6) No circumstance is shown to exist such as is contemplated in the application of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States; and

(7) Neither, because of any one or more of the matters complained of, was petitioner deprived of

such fair treatment and trial as are contemplated by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

No doubt of petitioner's guilt is shown to exist; all questions as to the deprivation of his constitutional rights rest almost entirely on his unsupported word and are wholly dissipated by a fair consideration of all the evidence; no spirit of racial prejudice or mob domination is presented; he was given ample time for preparation and trial; he was ably represented by three eminent counsel of his own choosing; and a case which, because of its inherent nature (created by the acts of the petitioner himself and his accomplice), might have been ultra-spectacular, was tried in a calm and dispassionate manner.

It is therefore respectfully submitted that the judgment should be affirmed.

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